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THE MONUMENTAL LEGACY OF THE ANTIQUITIES ACT OF 1906

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BIO:

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SUMMARY:

... On September 18, 1996, President Bill Clinton stood on the south rim of the Grand Canyon and announced the creation of the 1.7 million acre Grand Staircase Escalante National Monument in southern Utah. ... The potential significance of this restriction to national monument designation came to the fore during the Clinton Administration as a result of a proposal by a coalition of environmental, human rights, and religious groups to have the Alaska National Wildlife Refuge (ANWR) declared a national monument. ... Likewise, if a future President can demonstrate that a mistake was made in a previous proclamation as, for example, where the objects protected plainly did not require the withdrawal of particular lands, or were located outside the monument boundaries, then a modification clearly should be sustained. ... The prospect that such withdrawal decisions will be subject to executive branch review and politically charged proceedings every twenty years, and furthermore that a withdrawal might lapse even temporarily because of a future Secretary's deliberate or careless failure to ensure timely review of an existing withdrawal, makes FLPMA withdrawals far less protective than national monument proclamations. ...

TEXT:

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I. Introduction

On September 18, 1996, President Bill Clinton stood on the south rim of the Grand Canyon and announced the creation of the 1.7 million acre Grand Staircase Escalante National Monument in southern Utah. ⁿ¹ The proclamation, which was made shortly before the 1996 presidential election under the Antiquities Act of 1906, ⁿ² brought cheers from the environmental community. ⁿ³ But it caused an uproar among the political establishment in Utah and other parts of the West, reminiscent of other political battles over national monument proclamations, including the very land on which the President chose to make his announcement. ⁿ⁴

Even when viewed as an isolated use of the Antiquities Act, history likely will regard the Grand Staircase-Escalante decision as one of the Clinton Administration's most significant land protection initiatives. But it was only a beginning. Following his re-election in 1996, and acting on the recommendations of Secretary of the [*474] Interior Bruce Babbitt, n5 Clinton embarked on what was arguably the most ambitious expansion of the national monument system ever, exceeding even the prodigious efforts of the Theodore Roosevelt administration nearly one hundred years earlier. n6 By the end of his second term, Clinton had proclaimed twenty-two new or expanded national monuments, n7 thereby adding approximately six million acres to the national monument system. n8 Although the number and size of the monuments designated by President Clinton is remarkable [*475] able, the individual decisions fall squarely within a long tradition of presidential action under the Antiquities Act to protect special places that were, for a variety of reasons, unlikely to receive congressional protection. n9 Nonetheless, Clinton's actions have renewed a longstanding debate over the Antiquities Act, and have prompted calls for repealing or modifying the broad authority accorded the President under this arcane law. n10

This Article explores the Antiquities Act and its long and remarkable legacy. It describes the history of the law, n11 the special places that have received its protection, n12 and the many controversies that it has sparked over the years. n13 It then considers the myriad of legal and policy issues that are raised by the law, n14 and its continuing utility and evolution as a conservation management tool. n15 Finally, the Article discusses proposals to reform or repeal the Antiquities Act. n16

Some critics of the law have argued that the law divests Congress of its constitutional responsibility to "make all needful rules . . . respecting the . . . property belonging to the United States." n17 [*476] Others argue that the statute's lack of a public process is at odds with the fundamental tenets of a participatory democracy. n18 But the Congress recognized many years ago that it was in no position to manage the public lands, and over the years it has delegated broad land management authority to a host of federal agencies. n19 Moreover, the Antiquities Act is hardly unique in denying the public a role in the decisionmaking process, and it is arguably the very lack of process that has allowed the Antiquities Act to serve the American people so well over its long history. This assessment is not diminished by the plethoric use of the Antiquities Act during the Clinton Administration. On the contrary, Clinton's actions serve to confirm that the authority to proclaim national monuments should not be denied to future presidents.

II. Background and History of the Antiquities Act

Perhaps the most remarkable feature of the Antiquities Act of 1906 is its brevity. The heart of the law consists of two sentences:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such [*477] objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States. n20

Most commentators who have considered the Act and its legislative history have concluded that it was designed to protect only very small tracts of land around archaeological sites. n21 The complex political history of the law, however, suggests that some of its promoters intended a much broader design.

There seems little doubt that the impetus for the law that would eventually become the Antiquities Act was the desire

of archaeologists to protect aboriginal objects and artifacts. Following the discovery of such noted archaeological sites as Chaco Canyon and Mesa Verde, as well as dozens of lesser sites, private collecting of artifacts on public lands by both professionals and amateurs threatened to rob the public of its cultural heritage. n22 A consensus [*478] had emerged among policy officials that this practice had to be stopped and that even surveys conducted by qualified researchers had to be carefully regulated. n23 But officials from within the Department of the Interior consistently pushed for more expansive authority than was needed to address this specific problem, n24 and the Department's persistence helps to explain why the language included in the final legislation was not as limiting as some in Congress may have preferred.

In 1899, the American Association for the Advancement of Science and the Archaeological Institute of America separately established committees that subsequently joined together under the leadership of Dr. Thomas Wilson to draft a bill to protect a wide range of archaeological, historical, and aesthetic objects. n25 The broad language of Wilson's bill was incorporated in large part into a bill introduced by Congressman Jonathan Dolliver of Iowa on February 5, 1900. n26 That bill, H.R. 8066, authorized the President to:

[w]ithdraw from sale and set aside for use as a public park or reservation . . . any prehistoric or primitive works, monuments, cliff dwellings, cave dwellings, cemeteries, graves, mounds, forts, or any other work of prehistoric or primitive man, and also any natural formation of scientific or scenic value of interest, or natural wonder or curiosity on the public domain together with such additional area of land surrounding or adjoining the same, as he may deem necessary for the [*479] proper preservation or suitable enjoyment of said reservation. n27

Two competing bills were introduced in the House of Representatives by Congressman John F. Shafroth of Colorado. n28 The first of these, H.R. 8195, would merely have made it a federal crime for an unauthorized person to harm an aboriginal antiquity on public land. n29 The second bill, H.R. 9245, would have required a survey of public lands in four Western states and territories, authorized the Secretary to reserve tracts of land up to 320 acres in size to protect prehistoric ruins, and placed these lands in the custody of the Bureau of American Ethnology in the Smithsonian Institution. n30 All three bills were referred to the House Committee on Public Lands chaired by Congressman John Lacey of Iowa. n31

Lacey sent the three bills to Secretary of the Interior Ethan Hitchcock who referred them to Binger Hermann, Commissioner of the General Land Office. n32 While Hermann supported the general idea of preserving archaeological sites found on the public lands, he plainly preferred a bill that would grant the President broad authority to protect a wide range of resources. n33 Hermann noted, for example, "the need for legislation which shall authorize the setting apart of tracts of public land as National Parks, in the interest of science and for the preservation of scenic beauties and natural wonders and curiosities, by Executive Proclamation, in the same manner as forest reservations are created." n34

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Dissatisfied with all three of the bills that Lacey had referred to the Department, Hermann proposed a separate bill that embodied his more ambitious goals. n35 Congressman Lacey introduced H.R. 11021, entitled "A Bill to establish and administer national parks, and for other purposes," at the Department's request on April 26, 1900. n36 H.R. 11021 authorized the President to:

[s]et apart and reserve tracts of public land, which for their scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest, or springs of medicinal or other properties it is desirable to protect and utilize in the interest of the public; and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof. n37

While the law that was ultimately enacted does not authorize protection of lands for their "scenic beauty" or "natural wonders," it embraces the notion of protecting "objects of scientific or historic interest," which apparently was first proposed in Hermann's bill. n38 [*481] This language has proved dispositive in the cases that have supported an

expansive interpretation of the Antiquities Act. n39

To be sure, H.R. 11021 met resistance in the House largely because of its expansive language. n40 In a letter dated April 19, 1900, Congressman Lacey wrote to Secretary Hitchcock expressing the views of the entire committee:

[t]hat it would not be wise to grant authority in the Department of the Interior to create National parks generally, but that it would be desirable to give the authority to set apart small reservations, not exceeding 320 acres each, where the same contained cliff dwellings and other prehistoric remains. n41

Some members of Congress, particularly those from the western United States, did not want to grant the President broad authority to establish large new reserves on federal lands, in light of their experience with Theodore Roosevelt and his decisions setting aside vast tracts of public land as forest reserves under the General [*482] Revision Act of 1891. n42 Nonetheless, the Department continued to promote broader authority. n43

In the final push that eventually led to passage of the Antiquities Act, the focus within the House Public Lands Committee remained on archaeological artifacts. n44 The chief architect of the bill that eventually became law was Dr. Edgar Lee Hewett. n45 Hewett was one of the foremost experts on the Indian ruins of the southwestern United States, and he was well known within both academic and political circles. n46 In 1902, Hewett took Congressman Lacey on a tour of archaeological sites in the southwestern United States. n47 In 1904, W.A. Richards, the Commissioner of the General Land Office who succeeded Binger Hermann, asked Hewett to review the problem of drafting legislation that would preserve archaeological and other historic sites on federal lands. n48 Like his predecessor, however, Richards plainly supported legislation that would authorize the President to protect lands for broad purposes, including national parks. n49

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Hewett responded with a memorandum dated September 3, 1904 that reviewed all of the important known archaeological sites in Colorado, Utah, New Mexico, and Arizona that might be protected under the proposed law. n50 In drafting the bill that became the Antiquities Act, however, Hewett consulted with officials from the affected government agencies, and surely was influenced by Interior Department officials, especially Commissioner Richards, for whom he had conducted the review. n51 Thus, it should have been no surprise that the final bill reflected at least some of the Department's long held views on the need for more expansive legislation. In particular, although the words "historic" and "scientific" were flipped, the final bill included the basic language from H.R. 11021 that authorized the protection of "objects of scientific or historic interest." n52 Likewise, while the bill limited reserves to "the smallest area compatible with the proper care and management of the objects to be protected," it did not propose that reserves be limited in size to 320 or 640 acres as several predecessor bills had proposed. n53 Finally, the bill introduced the term "national monument" into the public lands lexicon. n54

On January 9, 1906, Congressman Lacey introduced Hewett's bill in the House of Representatives as H.R. 11016. n55 An identical companion bill was introduced in the Senate on February 26, 1906 by Senator Thomas Patterson of Colorado as S. 4698. n56 The [*484] legislation passed both houses of Congress without change and was signed into law by President Theodore Roosevelt on June 8, 1906. n57

There was very little debate over Hewett's bill, and thus Congress's understanding of what Hewett intended is not entirely clear. n58 Those commentators who claim that Hewett's proposed legislation was designed to encompass only small tracts of public lands frequently cite a colloquy between Congressman Lacey and Congressman John H. Stephens of Texas. n59 The House Report on the legislation further seems to support a narrow reading of the law. n60 But the compromise language proposed by Hewett does not reflect an intent to limit the President's authority as Lacey and others may have assumed. On the contrary, as noted above, Hewett had specifically included most likely at the urging of Interior Department officials language authorizing the President to proclaim as national monuments "objects of historic

or scientific interest," and had specifically avoided the acreage limits of the earlier bills while making clear that the area to be protected must still be the smallest area compatible with the protection of the [*485] objects. n61 Thus, far from demonstrating that Hewett's bill was designed to limit the President's authority to small tracts of land, the legislative history suggests a more ambiguous conclusion. n62 Hewett's bill established a middle ground between the "postage stamp" archaeological sites favored by western legislators, and the large scale reservations that could be designated solely for their scenic beauty, as was favored by the Department of Interior. n63 It is hardly surprising that a bill drafted by a representative for the Interior Department would favor the Department's longstanding efforts to promote broad executive powers to protect large tracts of land for a wide range of uses. n64

Thus far, the only judicial analysis of the legislative history of the Antiquities Act comes from an unpublished opinion in a case involving a challenge to various Alaska monuments proclaimed by President Carter. n65 In that case, the United States District Court for the District of Alaska reviewed various proposals before Congress during the time it was considering the Antiquities Act, including a proposal by Senator Henry Cabot Lodge of Massachusetts that would have protected only historic and prehistoric ruins, monuments, archaeological objects, and antiquities on the public lands. n66 Noting the broader language that Congress ultimately approved, the court concluded that the phrase "objects of historically scientific interest . . . was indeed intended to enlarge the authority of the President." n67

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Legislative history and congressional intent aside, n68 the plain language of the Antiquities Act supports a broad construction of the President's authority to protect large tracts of land. n69 The plain language of the Act, more than any legislative history, is likely to ensure judicial support for Antiquities Act proclamations that protect large landscapes arguably relevant to science and history. n70

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III. The Legacy of the Antiquities Act

To appreciate the legacy of the Antiquities Act, it is helpful to consider its place alongside other conservation authorities. At the time it was enacted in 1906, Congress had enacted no other laws that specifically authorized the President to set aside lands for preservation purposes. Congress had previously set aside Yellowstone National Park in 1872 n71 and had enacted the General Revision Act of 1891, which authorized the President to set aside forest reserves. n72 But while forests were generally withdrawn from disposition and entry under the homestead and other laws, they were not protected from other forms of development, especially mining. n73 As a result of Gifford Pinchot's utilitarian approach to forest management, the focus of the Forest Service was on the conservation and use of forest resources, and not on their preservation. n74

Presidents have asserted an implied power to reserve lands for conservation purposes, and this authority was ultimately upheld in *United States v. Midwest Oil Co.* n75 But at the time of the Antiquities Act, no legislative authority was available that provided for the preservation of public lands. Thus, when enacted in 1906, the [*488] Antiquities Act was unique in affording the President clear authority to set aside lands for preservation purposes. n76

Over the years, Congress has enacted many other laws that recognize and promote the preservation of public lands and their resources, including, most importantly, the National Park Service Organic Act of 1916, n77 the Wilderness Act of 1964, n78 the National Wildlife Refuge Administration Act of 1966, n79 and the National Wild and Scenic Rivers Act of 1968. n80 But with the possible exception of the Refuge Administration Act, n81 each of these laws clearly contemplates congressional establishment of protected areas, and all but the Park Service Organic Act were enacted in relatively recent times. Thus, while the Antiquities Act was not necessarily designed as a vehicle for public land preservation, it has carried much of that burden for many years, and it has performed remarkably well in that role, perhaps because the chief executive is in the best position to give voice to national preservation goals. n82

Between 1906 and 2001, fourteen presidents have established 122 national monuments covering approximately

seventy million acres of land in twenty eight states, one territory, and the District of Columbia, pursuant to their authority under the Antiquities Act. n83 Many of our most treasured national parks including Grand [*489] Canyon, Olympic, Zion, Bryce Canyon, Capitol Reef, Canyonlands, and Glacier Bay began as national monuments, and were frequently expanded under the Antiquities Act. n84 Until Richard Nixon broke the string, every President since Theodore Roosevelt had invoked the Antiquities Act and proclaimed a new or expanded national monument at least once. n85 In addition to Nixon, only President Reagan and the first President Bush failed to invoke the Antiquities Act during their tenure in office. n86 But the remarkable legacy left by the Antiquities Act did not develop without controversy.

a. the early history of the antiquities act

The story of the Antiquities Act, and its remarkable legacy, begins with President Theodore Roosevelt. Had Roosevelt not become President as a result of William McKinley's assassination in 1901, n87 and had he not dared to assert an expansive view of the law, the Antiquities Act might well have been relegated to the role that some in Congress plainly had intended, namely preservation of small tracts of land with archaeological or historic significance. n88

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Roosevelt was the first President of the Progressive Era, n89 and in line with this philosophy he took an activist approach toward the role of government, especially as it related to the conservation of natural resources. n90 Soon after the Antiquities Act was passed, Roosevelt designated Devil's Tower in Wyoming as the nation's first monument. n91 He followed that decision with seventeen more proclamations in less than three years, including, most importantly, the more than 800,000 acre Grand Canyon National Monument. n92 The Grand Canyon National Monument was important not only because of its significance to our national heritage, but also because it spawned the lawsuit that seemed destined from the start to secure the expansive interpretation of the Antiquities Act that would make the Act's legacy possible. n93

If one were to choose a set of facts from which to promote a broad reading of the Antiquities Act, one might very well have chosen the Grand Canyon as the setting, and invented a character like Ralph Henry Cameron. n94 Cameron, along with his brother Niles and a local prospector named Peter Berry, had located mining claims along the South Rim of the Grand Canyon and had successfully developed a copper mine in the canyon below Grandview Point. n95 Cameron's real interests, however, were along the Bright Angel Trail where he was able to use the mining law to exploit tourists [*491] rather than minerals. n96 Initially, Cameron charged a toll for access along the trail as authorized under an Arizona territorial law. n97 When his toll rights expired in 1906, Cameron used numerous strategically located, but probably invalid, mining claims along the trail n98 as a pretense for continuing to charge an access fee. n99 Unfortunately for Cameron, his interests conflicted with those of the Santa Fe Railroad Company, and the railroad challenged Cameron's claims in the courts and before the Department of the Interior. n100

In 1909, Secretary of the Interior James Garfield n101 declared that Cameron's claims lacked sufficient mineral values to justify issuing a patent. n102 Still, Cameron persisted in charging fees for access to public land that he did not own and for which he lacked any lawful claim, using his various political offices to keep the authorities at bay. n103 Eventually, Cameron's case wound up in the United States Supreme Court. n104 Among other things, Cameron alleged that President Roosevelt lacked the authority to designate the Grand [*492] Canyon as a national monument. n105 The Court quickly dismissed Cameron's Antiquities Act claim. n106 Quoting from Roosevelt's proclamation, the Court found that the Grand Canyon "is an object of unusual scientific interest." n107 The Court went on to note:

[The Grand Canyon] is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors. n108

Nowhere does the court specifically address the language from the Antiquities Act that the monument must be

"the smallest area compatible with the proper care and management of the objects to be protected," n109 but the clear implication of the Court's decision was that the size of the monument was not disqualifying if the "protected object" was otherwise of "scientific interest." n110 Cameron marks one of only two Supreme Court decisions that addresses the scope of the Antiquities Act. n111

Aside from the Grand Canyon, the most important of Theodore Roosevelt's other monuments was probably the Mount Olympus National Monument n112 in Washington, which now forms the core of the Olympic National Park. n113 The Mount Olympus proclamation [*493] was issued just two days before Roosevelt left office, n114 at a time when he likely was preoccupied with closing out his Administration. Because of these distractions, Roosevelt was not personally involved in developing the proposal, and he deferred entirely to the recommendation of Congressman William E. Humphrey of Washington in proclaiming the monument. n115 Still, Roosevelt was no stranger to the Olympic Peninsula. Among the "objects" protected in this proclamation were Roosevelt elk, n116 which were named in his honor in 1898 by the American biologist C. Hart Merriam. n117

The six presidents who followed immediately after Theodore Roosevelt took up the cause of proclaiming new monuments with surprising vigor. Among the ten monuments proclaimed by William Howard Taft was the Mukuntuweap National Monument n118 in southwestern Utah, which in 1915 was enlarged and renamed the Zion National Monument by President Wilson. n119 On November 19, 1919, Congress further enlarged the protected area, and redesignated it the Zion National Park. n120

Woodrow Wilson established or modified seventeen national monuments. n121 He proclaimed the first eighty acres of what is now the more than 200,000 acre Dinosaur National Monument in northwestern Colorado and northeastern Utah, n122 as well as the [*494] Sieur de Monts National Monument n123 in Maine in 1916, which now forms the core of Acadia National Park. n124

Perhaps the most important of William Harding's eight national monuments was Bryce Canyon n125 in southern Utah, now included in the Bryce Canyon National Park. n126 Calvin Coolidge created thirteen national monuments including Craters of the Moon n127 in Idaho, Glacier Bay n128 in Alaska, and the Statue of Liberty n129 in New York. Herbert Hoover created nine national monuments including Arches n130 in southeastern Utah, the Great Sand Dunes n131 in southern Colorado, Death Valley n132 in California, and Saguaro n133 in southern Arizona. n134 Each of these monuments is now a national park. n135

In addition to enlarging many existing monuments, Franklin Roosevelt created eleven new monuments including the Joshua Tree [*495] National Monument n136 in California, Cedar Breaks n137 in southwestern Utah, Capitol Reef n138 in southern Utah, Channel Islands n139 off the coast of southern California, the Badlands National Monument n140 in western South Dakota, and the Jackson Hole National Monument n141 in Wyoming. This last decision sparked the next major lawsuit under the Antiquities Act. n142

Roosevelt's Jackson Hole proclamation designated 221,610 acres of land as a national monument which included 32,117 acres of land donated by John D. Rockefeller, Jr., n143 and which enclosed approxi [*496] mately 17,000 acres of private land. n144 Shortly after the proclamation was signed, Congressman Frank Barrett of Wyoming introduced legislation to abolish the monument. n145 In testimony before the House Committee on Public Lands, Barrett described the land included within the new monument as follows:

It is rough sagebrush, grazing land, and some lakes but there is no particular reason it should be included in the Park Service, and this land has been used and is beneficial for livestock, and for farming purposes and nothing more. n146

Other witnesses, however, including noted biologist Olaus Murie, National Park Service Director Newton Drury, and United States Geological Survey Director F.M. Fryxell, testified to the outstanding, [*497] scientific, biological, geological, and historic features of the area. n147

In Wyoming v. Franke, n148 the State challenged Roosevelt's proclamation on the grounds that the evidence failed to support the claim that the monument contained "historic landmarks, [and] historic or prehistoric structures or objects of historic or scientific interest." n149 After hearing evidence on both sides, the court noted that it had limited authority to review the proclamation:

If there be evidence in the case of a substantial character upon which the President may have acted in declaring that there were objects of historic or scientific interest included within the area, it is sufficient upon which he may have based a discretion. n150

Moreover, the court conceded that:

[I]f a monument were to be created on a bare stretch of sage brush prairie in regard to which there was no substantial evidence that it contained objects of historic or scientific interest, the action in attempting to establish it by proclamation as a monument, would undoubtedly be arbitrary and capricious and clearly outside the scope and purpose of the Monument Act. n151

But the court found ample evidence "of experts and others" to support the Jackson Hole National Monument, and refused to "probe the reasoning which underlies this Proclamation" on the [*498] grounds that it would constitute "'a clear invasion of the legislative and executive domains.'" n152

The controversy over the Jackson Hole National Monument also sparked what was perhaps the most successful congressional opposition to a monument proclamation. Lengthy hearings were held before the House Committee on Public Lands, and virtually every prominent Wyoming politician offered testimony opposing the monument. n153 In 1944, Congress actually passed legislation that would have abolished the monument, n154 but Roosevelt pocket vetoed the bill. n155 In response, Congress refused to appropriate money for the management of the monument for seven years after it was proclaimed. n156 Finally, in 1950, Congress negotiated a compromise with President Truman that provided for adding the monument lands to the Grand Teton National Park, n157 but amending the Antiquities Act to prohibit the President from designating any further monuments in Wyoming. n158 Many years later, former Senator Clifford Hansen, who led the opposition to the Jackson Hole National Monument, conceded that his opposition was a mistake. n159

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Franke's deferential approach toward reviewing monument proclamations was implicitly affirmed by the United States Supreme Court in Cappaert v. United States. n160 That case involved President Truman's designation of the Devil's Hole National Monument to protect an underground pool and a unique species of fish that resided there. n161 In upholding the federal government's claim to reserved water rights sufficient to protect the fish, the Court rejected Cappaert's claim that the Antiquities Act protected only archaeological sites. n162 On the contrary, the Court found that "the language of the [Antiquities] Act . . . is not so limited" and that "[t]he pool in Devil's Hole and its rare inhabitants are objects of historic or scientific interest." n163

b. the quiescent period

After Franklin Roosevelt and until Jimmy Carter, presidents continued to expand and otherwise modify existing monuments, but new monuments slowed to a trickle. n164 There were, however, two important monuments established during this period. The first was the C&O Canal proclaimed by Dwight Eisenhower at the end of his administration in 1961. n165 The canal, which stretches more than 180 miles between Washington and Cumberland, Maryland, operated from 1828-1924, primarily to haul coal from western Maryland. n166 Many of the original locks and aqueducts along the canal were preserved, as was the towpath that runs the entire length of the canal. n167 The proclamation recognizes these historic [*500] structures as the principal reason for proclaiming a national monument. n168

Some members of Congress held continuing disdain for these executive branch proclamations. In fact, Eisenhower's decision so piqued Congressman Wayne Aspinall of Colorado, the powerful chair of the House Committee on Interior and Insular Affairs, that Aspinall blocked funding for the C&O Canal National Monument for many years. n169 Aspinall's action, like the action of an earlier Congress with respect to the Jackson Hole National Monument, served as a continuing warning to future presidents that national monument proclamations under the Antiquities Act carried risks. A President might be able to preserve the status quo on public lands through a monument proclamation, but he might be denied the money that was needed to protect the monument's resources.

The other important monument proclaimed during this period was Marble Canyon, adjacent to the former Grand Canyon National Monument and now part of the Grand Canyon National Park. n170 Lyndon Johnson issued the proclamation on the last day of his Administration in 1969 after a protracted fight over a proposal to build two dams in the Colorado River. n171 One of the proposed dams would have inundated Marble Canyon. n172 The Johnson administration, and his Secretary of the Interior Stewart Udall, had initially supported the dams, but the proposals triggered a massive and ultimately successful campaign by the conservation community to [*501] block their construction. n173 In 1967, Udall took a rafting trip down the Colorado River through the Grand Canyon and recanted his support for the dams. n174 A little more than a year later, Lyndon Johnson proclaimed the Marble Canyon National Monument. n175

While the Marble Canyon proclamation made an important contribution to the protection of the Grand Canyon, the proclamations that Lyndon Johnson chose not to proclaim offer a more telling portrait of the political difficulties that presidents face in using the Antiquities Act. Secretary Udall and his staff had developed seventeen monument proposals for the President's consideration, in large part because these areas were not likely to receive congressional protection. n176 In the end, Johnson chose to designate only Marble Canyon and to approve modest expansions at several other monuments. n177 But the political fallout from Udall's more ambitious agenda nearly cost him his job just two days before the end of the Johnson Administration. n178

After Johnson, Richard Nixon chose not to exercise his authority under the Antiquities Act, and Gerald Ford limited his efforts to the modest expansion of two existing monuments. n179 The election of [*502] Jimmy Carter, however, ultimately led to the largest expansion of the monument system in our nation's history.

c. jimmy carter and the alaska monuments

President Jimmy Carter did not make extensive use of the Antiquities Act, with one remarkable exception. On December 1, 1978, Carter proclaimed seventeen new or enlarged national monuments in Alaska, covering fifty-six million acres. n180 For their sheer size, Carter's proclamations were unparalleled, n181 and it is unlikely that land-based monuments will ever again approach their scale. n182 The path that led to protecting these lands serves as a testament to the significant role that the Antiquities Act continues to play in land preservation in the United States.

Congress took the first step toward protecting large tracts of "national interest" lands in Alaska on December 18, 1971 when it passed the Alaska Native Claims Settlement Act (ANCSA). n183 ANSCA granted Alaska Natives the right

to select approximately [*503] forty four million acres of federal land in Alaska. n184 In addition, however, section 17(d)(2) of ANCSA n185 gave the Secretary of the Interior nine months to withdraw up to eighty million acres of land for further study as possible additions to the National Park, National Wildlife Refuge, National Wild and Scenic Rivers, and the National Forest Systems. n186 The Secretary was supposed to submit the required studies for these "(d)(2)" lands to Congress within two years of ANCSA's enactment. n187

On December 17, 1973, Secretary of the Interior Rogers Morton proposed legislation to protect approximately 83.5 million acres of land in Alaska, as national parks, forests, refuges, and wild rivers. n188 As provided by ANCSA, the effect of this recommendation was to withdraw most of this land for a period of five years while Congress considered the recommendations and decided how to proceed. n189

Acting on the Secretary's recommendation, the House of Representatives passed legislation on May 19, 1978 by a vote of 277 31. n190 A separate bill also was reported out of the Senate Energy and Natural Resources Committee, but the full Senate never voted on the bill, and the five year deadline was doomed to run without the enactment of the necessary legislation. n191 This would have meant that the lands that had been closed for study as possible conservation units would now once again be opened to various forms of entry and development. n192

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To avoid having these lands reopened before Congress could enact appropriate legislation, the Carter Administration took several actions. First, on November 16, 1978, Secretary of the Interior Cecil Andrus temporarily withdrew 105 million acres of land under section 204(e) of the Federal Land Policy and Management Act (FLPMA) for a three year period. n193 The Secretary of Agriculture withdrew an additional eleven million acres under FLPMA section 204(b) for a two year period. n194 Finally, on December 1, 1978, the President proclaimed seventeen new or expanded national monuments in Alaska covering nearly fifty six million acres of land to be administered by the National Park Service, the United States Fish and Wildlife Service, and the United States Forest Service. n195 In announcing these new monuments, Secretary Andrus made clear that the Carter Administration would not allow "Alaska [to] become a private preserve for a handful of rape, ruin and run developers." n196

The Carter monuments sparked bitter opposition in Alaska, n197 but the withdrawals effectively halted mineral development in Alaska and thereby provided the impetus for congressional action. On December 2, 1980, two years after these executive actions, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA). n198 ANILCA designated more than one hundred million acres of land in new conservation units, including 43.6 million acres of new parklands, 53.7 million acres of new wildlife refuge land, twenty five new wild and scenic rivers, and 56.4 million acres of wilderness. Many of the protected areas were carved out of the monuments that had been declared just two years earlier by President Carter. n199

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Despite Congress's ultimate support for much of what the Carter Administration had done, ANILCA imposed a significant new limit on executive authority to withdraw lands in Alaska. The relevant language from ANILCA provides that:

No future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska shall be effective except by compliance with this sub section. To the extent authorized by existing law, the President or the Secretary may withdraw public lands in the State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after notice of such withdrawal has been submitted to Congress. n200

The potential significance of this restriction to national monument designation came to the fore during the Clinton

Administration as a result of a proposal by a coalition of environmental, human rights, and religious groups to have the Alaska National Wildlife Refuge (ANWR) declared a national monument. n201

The Clinton Administration opposed oil and gas development in ANWR, but the groups were concerned that a subsequent administration might take a different view. n202 The State of Alaska, which supported oil and gas development in ANWR, opposed monument [*506] designation, and apparently took the position that the above referenced language from ANILCA effectively precluded it. n203 ANILCA, however, prohibits new withdrawals in excess of 5,000 acres. n204 It does not preclude a mere national monument designation that does not include a withdrawal of lands. n205 Since the Antiquities Act does not require a withdrawal or reservation of lands, it might have been possible for the President to declare ANWR a national monument in name only, without actually withdrawing the land from any uses. n206 Declaring ANWR a national monument would have effectively precluded mineral leasing under the Mineral Leasing Act of 1920. n207 But ANILCA had already closed ANWR to mineral leasing unless Congress enacted specific legislation to allow it. n208 For this reason, and in reliance on the advice of Secretary Babbitt, Clinton decided that it was unnecessary to proclaim ANWR a national monument. n209

Despite the fact that the conservation units established under ANILCA ultimately supplanted the monuments proclaimed by Carter, it was the Antiquities Act decision that prompted two lawsuits, one brought by the State of Alaska and the other by the Anaconda Copper Company. In *Alaska v. Carter*, n210 the State claimed that the President's decision to designate a monument, and the Secretary of the Interior's recommendation to the President that he declare a monument, were subject to NEPA's environmental impact statement requirement. n211 The court did not address the scope of the Antiquities Act directly, but did conclude that the [*507] President was not an agency subject to NEPA's impact statement requirement. n212 Furthermore, the court found that since the Interior Department's recommendation was made at the President's request, the Interior Department could not be compelled to file an impact statement before making its recommendation. n213 According to the court, to hold otherwise "would raise serious constitutional questions." n214

In contrast to the procedural issue raised by the State of Alaska, the Anaconda Copper Company claimed that the Alaska proclamations were substantively flawed because they were beyond the scope of the Antiquities Act. n215 In an unpublished opinion, the court rejected the mining company's arguments, finding that while the Antiquities Act imposes limits on the exercise of presidential authority, the President had adequately justified the Alaska monuments as objects of scientific interest. n216

d. the resurgence of the antiquities act in the clinton era

Viewed in isolation, Bill Clinton's record under the Antiquities Act was extraordinary and on most counts more impressive than the [*508] record of Theodore Roosevelt. When viewed from the perspective of history, however, Clinton's record is truly remarkable because his decisions were made against a backdrop of nearly a hundred years of presidents, legislators, and public land administrators with the prior opportunity to evaluate and recommend lands for protection under the Antiquities Act and a host of other land protection laws. The most obvious candidates had long since been protected. Moreover, every single monument created during the Clinton Administration came at a time when the Republican party the opposition party held control of both houses of Congress. n217 And many of these Republicans were adamantly opposed to the Antiquities Act, and especially to its repeated use by a Democratic president. n218

The monuments created during the Clinton Administration are a diverse collection. They include four small historic sites, n219 one new and one expanded monument in the Virgin Islands that consist entirely of submerged lands, n220 the California Coastal National Monument, which includes all unappropriated islands, rocks, pinnacles, and exposed reefs in the jurisdictional waters of the United States for the 841 miles of California coastline, n221 and [*509] fourteen monuments that are managed in whole or in part by the Bureau of Land Management (BLM). n222 One new monument Giant Sequoia in California is managed primarily by the United States Forest Service, n223 and one Hanford Reach,

which protects the last free flowing nontidal stretch of the Columbia River is managed primarily by the United States Fish and Wildlife Service, in cooperation with the Department of Energy. n224 The National Park Service has a role in managing ten of the new or expanded monuments. n225

The monuments entrusted to BLM management are of particular importance because of the precedent they establish and because of their sheer size. Among these is the Grand Staircase Escalante, n226 which was the first, the largest, and politically the most important of the BLM monuments. It encompasses a vast and largely undeveloped landscape of steep canyons and spectacular geologic features that borders the Capitol Reef National Park and Glen Canyon National Recreation Area on its east side, and Bryce Canyon National Park on the west. n227 The 1,014,000 acre Grand Canyon Parashant National Monument n228 on the northwest side of the Grand Canyon National Park, and the 293,000 acre Vermilion Cliffs [*510] National Monument n229 on the northeastern side of the Park, encompass similar landscapes and help to secure the ecology of the Grand Canyon. n230

Two of the BLM's new monuments the 71,100 acre Agua Fria n231 in Arizona and the 164,000 acre Canyons of the Ancients n232 in Colorado were set aside largely for their archaeological importance. Two others the 128,917 acre Ironwood Forest National Monument n233 and the 486,149 acre Sonoran Desert National Monument n234 are designed to protect the unique biological resources of the Sonoran desert. The 52,947 acre Cascade Siskiyou National Monument in Oregon was designated primarily to protect its rich biological diversity, n235 and the 504,729 acre Upper Missouri River Breaks National Monument n236 protects biological, geological, and historical objects along the Upper Missouri River through Montana.

In addition to these monuments, the Antiquities Act legacy left by the Clinton Administration arguably should include several areas that received legislative protection only because Secretary Babbitt indicated that he was considering monument recommendations for these areas. n237 The Secretary was actively involved with each of the legislative proposals and insisted that they meet certain standards before he would agree not to pursue monument designations. n238 [*511] Lands that were protected by legislation in lieu of having monument designations included Steens Mountain in eastern Oregon, n239 Colorado Canyons in Colorado, n240 the Santa Rosa and San Jacinto Mountains in California, n241 Black Rock Desert in Nevada, n242 and Las Cienegas in Arizona. n243 In a significant concession to the management precedent established by Secretary Babbitt, all five of these areas will be managed by the BLM. n244 In addition to these designations, eighty four million acres of submerged lands in the northwestern Hawaiian Islands were protected by executive order, following a public comment period, n245 under the National Marine Sanctuaries Act, n246 in lieu of granting these lands national monument status.

Several cases involving challenges to the proclamations made by President Clinton have sought to reopen some of the legal questions raised in earlier cases regarding the scope of the Antiquities Act. n247 Three separate lawsuits were filed challenging various aspects of the Grand Staircase Escalante decision. n248 The cases were consolidated in the federal district court for Utah, but one of the parties the Utah Schools and Institutional Trust Lands Administration [*512] settled their case after Congress passed legislation providing for the exchange or disposition of state lands located inside the monument's borders. n249 Another lawsuit was filed in federal court in Arizona challenging the Grand Canyon Parashant National Monument. n250 Finally, two lawsuits were filed in federal court in the District of Columbia. One of these was a generic lawsuit filed by the Mountain States Legal Foundation challenging various aspects of four national monument designations, namely Canyons of the Ancients, Cascade Siskiyou, Hanford Reach, and Ironwood. n251 The other was filed by Tulare County and others challenging the Giant Sequoia National Monument. n252 In these last two cases, the Court of Appeals for the District of Columbia Circuit affirmed district court decisions granting the federal government's motion to dismiss the cases, finding that the proclamations easily met the court's limited review authority. n253

Given the size of many of the Clinton monuments, one issue that is likely to arise in these cases is whether a monument can be designated to protect a large landscape or ecosystem. While the Clinton proclamations take care to

identify particular "objects of historic and scientific interest," they also acknowledge the importance of landscapes and ecosystems for the protection of biological resources. For example, while the relevant proclamation describes the Sonoran Desert National Monument as "a magnificent example of untrammeled Sonoran desert landscape" and as encompassing "a functioning desert ecosystem," n254 it also describes in detail the specific plant and animal communities and the historic and archaeological objects located within the monument. n255 Thus, it may [*513] be unnecessary for the government to claim that a landscape or an ecosystem is itself the "object" protected in a proclamation.

Even if the government relies on a landscape or ecosystem to defend a monument decision, however, it seems likely that such "objects" would qualify for monument status. The vast literature that has developed in recent years describing landscape ecology and ecosystem management offers strong support for the claim that a landscape or ecosystem is a legitimate object of scientific interest. n256 Moreover, if the courts continue to follow the deferential approach taken by the United States Supreme Court in Cameron n257 and Cappaert, n258 the Wyoming district court in Franke, n259 the Alaska district court in Anaconda, n260 and the District of Columbia circuit court in Tulare County n261 and Mountain States, n262 a proclamation protecting a landscape or ecosystem seems likely to be upheld. n263

To be sure, the legal analysis offered in the Antiquities Act cases has been sparse, n264 and it is possible that some future court will take a closer look at the scope of the Antiquities Act. But it remains unlikely that any court will overturn a presidential proclamation [*514] declaring a national monument, absent compelling evidence that the area designated lacks objects of historic or scientific interest. n265

IV. The Management of National Monuments

a. what makes a monument?

Among the quandaries posed by the terse language in the Antiquities Act is the uncertainty over the management and use restrictions that apply to national monuments. The statute authorizes the President to "reserve" the land, but does not require that he do so. n266 Moreover, the scope of any such reservation may vary considerably, and the monuments proclaimed thus far reflect a wide diversity of restrictions. n267 In general, however, virtually all [*515] monument proclamations contain very similar language warning "all unauthorized persons not to appropriate, injure, destroy, or remove any feature" of the monument, and "not to locate or settle upon any of the lands thereof." n268 Furthermore, when a monument is declared on lands that previously have been reserved for other purposes, the monument designation is declared to be the "dominant reservation." n269 The significance of this standard language became most apparent in the Mount Olympus National Monument, when Gifford Pinchot drafted language that he thought would allow logging to continue within the monument. n270 Pinchot's language provided in relevant part that:

[T]his proclamation is not intended to prevent the use of the lands for forest purposes under the proclamation establishing the Olympic National Forest, but the two reservations shall both be effective on the land withdrawn. n271

This language was followed, however, by the standard language making the monument designation dominant, and the standard warning against appropriating, injuring, removing, or destroying any features of the monument. n272 Based upon this language, the [*516] Department of the Interior concluded that logging was not allowed within the monument. n273

For monuments that become part of the national park system, the National Park Service Organic Act requires strict management to protect and preserve the lands within the monument. n274 Monuments that are managed by the United States Fish and Wildlife Service as part of the National Wildlife Refuge System are subject to other, albeit less stringent,

restrictions. n275 By contrast, for monuments on Forest Service or BLM lands, broader uses may be allowed. n276

At a minimum, all national monument lands are off limits to new mineral leasing n277 under the express terms of the Mineral Leasing Act. n278 Furthermore, land management agencies entrusted with [*517] management of a national monument are charged with managing the "objects" as may be necessary to fulfill the purposes of the proclamation. n279 This usually means withdrawing the area from location under the mining laws. n280 It also may require restrictions on grazing, rights of way, and other uses of the land, including recreational uses. n281 These restrictions can be imposed in the proclamation itself, n282 but to the extent that they involve discretionary actions, such as a decision to grant a new right of way, they [*518] might simply be handled in the course of managing the monument. n283

National monuments may be reserved only "upon the lands owned or controlled by the Government of the United States." n284 Thus, while the exterior boundaries of a monument may enclose private or state owned land, the monument does not include those lands. n285 Monuments also may include submerged lands that are under the "control" of the United States. n286 The Office of Legal Counsel in the Department of Justice has determined that this may include lands in the territorial sea, n287 which extends twelve miles [*519] seaward, and even those within the exclusive economic zone of the United States, which extend two hundred nautical miles seaward. n288 This latter issue arose in the context of a proposal to establish a national monument over a substantial tract of predominantly submerged lands in the northwestern Hawaiian Islands. Although this area was ultimately protected by an executive order under the National Marine Sanctuaries Act, n289 the Office of Legal Counsel opined that a national monument encompassing these submerged lands would have been a viable option. n290

As described in greater detail below, n291 the management policies put in place by Secretary Babbitt, especially for BLM monuments, may go a long way toward focusing the attention of policymakers and perhaps even the courts on the essential characteristics that make a particular national monument. But ultimately, it seems that national monuments are a bit like snowflakes, each with a character of its own.

b. jurisdictional issues in monument management

The Antiquities Act does not grant any particular federal agency the responsibility for managing national monuments, n292 and management of the early monuments was often given to the agency with prior jurisdiction over the lands. n293 Between 1910 and 1925, [*520] nine national monuments were placed under the jurisdiction of the Department of War. n294 The United States Forest Service in the Department of Agriculture was responsible for more than twenty monuments carved out from Forest Service lands before 1943, and the National Park Service in the Department of the Interior was responsible for those monuments on lands managed by the Interior Department. n295 This system did not work well for any of these three agencies. The War Department showed little interest in managing its monuments, and frequently authorized private organizations to manage those monuments which attracted tourists. As a result, even the Statue of Liberty the War Department's premier site suffered by comparison to its counterparts in the Park Service. n296

The Forest Service and the "utilitarian conservation" approach pioneered by Gifford Pinchot n297 were at odds with the Park Service and its preservation mandate. n298 More importantly, the competition between the two agencies to administer the same lands was fierce, and Forest Service monuments were often perceived correctly it seems n299 as a target for Park Service acquisition. n300 But the Park [*521] Service was not entirely comfortable with managing monuments either, especially those that did not meet the standards for grandeur that had come to characterize the early national parks. n301

When Congress was considering passage of the National Park Service organic legislation, n302 it originally proposed to transfer jurisdiction over all national monuments to the Park Service. n303 The final version of the law, however,

merely grants to the Park Service jurisdiction over those monuments "now under the jurisdiction of the Department of the Interior," n304 and authorizes the Park Service to make regulations for those monuments under their jurisdiction. n305 Following the passage of the 1916 National Park Service organic legislation, presidents continued to designate monuments and place them under the jurisdiction of the United States Forest Service. n306

In 1929, President Herbert Hoover requested an opinion from the Attorney General on the President's authority to transfer those national monuments under the jurisdiction of the War and Agriculture Departments to the National Park Service. n307 The Attorney General concluded that the President lacked such authority because, [*522] under the Antiquities Act, "Congress intended that jurisdiction to administer the national monuments which the President was . . . authorized to create should reside in the Departments which had jurisdiction respectively of the land within which the monuments were located." n308 The Attorney General based his conclusion on language in the Antiquities Act which recognized that several federal departments might have jurisdiction over tracts of land that were designated as national monuments. n309 But nowhere does this language require that the lands remain under that department's jurisdiction once a monument has been created. Perhaps a better explanation for the decision is simply that the Antiquities Act contains a limited delegation to the President that authorizes him to designate national monuments but does not authorize him to transfer jurisdiction over federal lands. Since Congress has the constitutional authority to regulate federal lands, n310 national monuments designated by the President must, absent other authority, remain with the department that has jurisdiction over the lands before the monument is proclaimed. n311

Surprisingly, and in apparent derogation of this advice, Herbert Hoover transferred jurisdiction over at least two national monuments. One was Arches National Monument in southeastern Utah. The public lands that made up this monument had been under the jurisdiction of the General Land Office, but were transferred to the National Park Service in the 1929 proclamation establishing the monument. n312 The other was the Bandelier National Monument in [*523] New Mexico, which Hoover transferred from the Forest Service to the Park Service in 1932. n313

In 1933, Congress passed legislation granting the President broad authority to "[t]ransfer the whole or any part of any executive agency and/or functions thereof to the jurisdiction . . . of any other executive agency." n314 On June 10, 1933, acting pursuant to this authority, President Franklin Roosevelt issued Executive Order No. 6,166, which provides in relevant part as follows:

All functions of administration of public buildings, reservations, national parks, national monuments, and national cemeteries are consolidated in an Office of National Parks, Buildings, and Reservations n315 in the Department of the Interior, at the head of which shall be a Director of National Parks, Buildings, and Reservations; except that where deemed desirable there may be excluded from this provision any public building or reservation which is chiefly employed as a facility in the work of a particular agency. This transfer and consolidation of functions shall include, among others, those of the National Park Service of the Department of the Interior and the National Cemeteries and Parks of the War Department which are located within the continental limits of the United States. National cemeteries located in foreign countries shall be transferred to the Department of State, and those located in insular possessions under the jurisdiction of the War Department [*524] shall be administered by the Bureau of Insular Affairs n316 of the War Department. n317

The result of this order was to move to the Park Service numerous national monuments which were previously managed by non-Interior agencies, primarily the Forest Service in the Department of Agriculture.

On September 29, 1933, the Secretary of Agriculture wrote to the Secretary of the Interior requesting to exclude the fifteen national monuments then under the jurisdiction of the Forest Service from Executive Order No. 6,166. n318 The Secretary of Agriculture noted that the lands embraced within the fifteen national monuments were also withdrawn for national forest purposes, and that this "duality of withdrawal [was] specifically recognized in the proclamations by which fourteen of the monuments were created." n319 The Agriculture Secretary thought that the "most practicable and

satisfactory adjustment of this matter would be to exempt the fifteen areas from the transfer to keep them under unified management." n320 The Solicitor disagreed, stating:

Whether or not these monuments, due to their dual status as both national forests and national monuments, may be more efficiently administered under the jurisdiction [*525] of the Agriculture Department or the Interior Department is not for legal determination, but should be considered administratively. n321

Furthermore, he noted that the dual status of these lands as both monuments and national forests did not make the Interior Department's administration of these monuments "impossible or impracticable." n322

The Secretary of Agriculture also asked whether the exception clause in Executive Order No. 6,166 for "reservations . . . employed as facilities" might be invoked to allow the Forest Service to administer the monuments that would otherwise have been transferred under the order. n323 The Solicitor concluded that such exceptions could be made only within the sixty day congressional waiting period required for executive orders under the 1933 Reorganization Act. n324 According to the Solicitor, once that time expired, "the status of all monuments transferred or consolidated became crystalized, and changes [could] be effected only through further action by the President or Congress." n325

One issue left unresolved by Executive Order No. 6,166 is whether it applies only to monuments in existence at the time the order was entered in 1933, or whether it also applies to future national monuments established by presidential proclamation. The language of the Executive Order applies arguably to existing and future monuments, since it provides for the transfer of "all functions of administration of . . . national monuments" rather than providing for the transfer of monuments themselves. n326 In fact, presidents [*526] have continued to transfer lands to the National Park Service upon their designation as a national monument. n327

In 1978, however, when President Carter proclaimed seventeen new or expanded national monuments in Alaska, he left two of those monuments under the management of the United States Forest Service. n328 This decision triggered two brief legal opinions from the Office of Legal Counsel (OLC) in the Department of Justice relating to the administration of national monuments by non Interior agencies. n329 In an opinion dated February 9, 1979, the OLC found that Executive Order No. 6,166 "requires the transfer of management functions [for national monuments on national forest lands] [*527] from the Forest Service to the National Park Service." n330 The opinion further stated that "[i]t is not possible to amend Executive Order No. 6,166 merely by issuing an amending order because the original order itself became effective only with the assent of Congress." n331 In support of this claim, the OLC cited a 1934 Attorney General Opinion addressing the legality of two proposed executive orders submitted by the Director of the Budget. n332 The first delayed the effective date of section 18 of Executive Order No. 6,166; the second revoked section 18 entirely. n333 The 1934 opinion concluded that, although:

[t]he statute does not expressly authorize the President to revoke in whole or in part any Executive order which has become law . . . where as here, the President determines after further investigation that certain provisions of such an Executive order "are not in the public interest or consistent with the efficient operation of the government," he is impliedly authorized by the statute to revoke such provisions in the same manner in which they were enacted into law. n334

The 1933 Reorganization Act expressly authorized the adoption of executive orders, provided that such orders were first submitted to the Congress for a sixty day waiting period while the Congress was in session. n335 Contrary to the implication of the 1979 Office of Legal Counsel opinion, however, the 1934 opinion did not require congressional assent for such orders to take effect. n336 Indeed, the 1934 opinion expressly approved the proposed executive orders amending Executive Order No. 6,166 as to "form and legality" without the congressional authorization that the 1979 opinion suggests was [*528] needed. n337 Thus, following the 1934 opinion, the President may issue an executive order

that amends or overrides Executive Order No. 6,166 without congressional authorization, even if that order is otherwise construed to have prospective effect. n338

The 1979 opinion also addressed the exception clause in Executive Order No. 6,166 finding that it did not apply to these monuments, because the national forest land in question could not be considered a reservation " 'which is chiefly employed as a facility in the work of a particular agency.' " n339 Accordingly, the 1979 opinion concluded that Executive Order No. 6,166 "does require the transfer of management [to NPS], and that a legally effective reorganization plan, or other legislative action, is necessary in order to authorize the Forest Service to administer the two monuments." n340

Following a Department of Agriculture request to reconsider its opinion, the Office of Legal Counsel issued a second opinion in 1980 that distinguished an agency's responsibility as land manager on lands encompassing a national monument from the National Park Service's responsibility as monument administrator. n341 While affirming its previous finding that "Executive Order No. 6166 creates management authority in the National Park Service with respect to national monuments," the 1980 opinion conceded that the Forest Service may participate in the management of monuments on national forest lands so long as the order establishing the [*529] monument does not terminate the national forest status of the lands. n342 Moreover, while the 1980 opinion noted that the Departments of Agriculture and Interior had reached an agreement that all management responsibilities for national monuments on national forest lands established prior to 1933 (the effective date of Executive Order No. 6,166) were transferred to the National Park Service, n343 it conceded that a dual management structure in which Interior administered the monument and Agriculture managed the forest was possible for post 1933 monuments:

[A] determination as to pre 1933 monuments . . . does not preclude a case by case administrative decision as to the proper management of post 1933 national monuments to the extent permitted by the executive order and any other applicable statutory authorities. Executive Order 6166 creates management authority in the National Park Service with respect to national monuments even if created on forest lands; whether that authority is exclusive, additional, delegable, or forfeitable depends on the terms of the order and other authorities that may exist with respect to the lands. n344

The 1980 opinion thus seems to open the door for the President to grant limited authority to the pre monument land management agency for both the management and administration of a monument [*530] even if that agency is outside the Department of the Interior in the order creating the national monument. n345 But it remains at odds with the view taken by the Attorney General in 1934 that Executive Order No. 6,166 can be amended by a new executive order. n346

In 1950, Congress enacted legislation authorizing Reorganization Plan No. 3 of 1950. n347 This plan was designed to consolidate in the Secretary of the Interior all of the various legal authorities previously vested by Congress in the various specific bureaus and offices of the Interior Department. n348 Among other things, it provided that, with certain exceptions not relevant here, "there are hereby transferred to the Secretary of the Interior all functions of all other officers of the Department of the Interior and all functions of all agencies and employees of such Department." n349 The Reorganization Plan went on to authorize the Secretary to delegate any function back to various bureaus and offices:

The Secretary of the Interior may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Interior of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan. n350

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Thus, whether or not Executive Order No. 6,166 applies prospectively, the 1950 legislation allows the Secretary of the Interior to transfer functions internally from the National Park Service to other Interior agencies. n351 This legislation did not resolve whether monuments designated on lands under the jurisdiction of non Interior agencies must be administered by the National Park Service in accordance with Executive Order No. 6,166. Moreover, even for transfers within the

Interior Department, the enactment of the Federal Land Policy and Management Act (FLPMA) in 1976 may confound the otherwise plain authority contained in the 1950 legislation.

Section 204 of FLPMA broadly defines a "withdrawal" as "withholding an area of Federal land" from the operation of certain public land laws, or "transferring jurisdiction over an area of Federal land." n352 Section 204(j) of FLPMA further provides that "[t]he Secretary shall not . . . modify or revoke any withdrawal creating national monuments." The statute does not speak to the Secretary's authority to "make" withdrawals creating national monuments as it does with respect to other types of withdrawals in the very same section of the statute. n353 Thus, it appears that the Secretary retains the authority to "make" a withdrawal not by creating a monument, [*532] since that authority is vested in the President but rather by transferring the jurisdiction of a national monument from one agency to another. This would include the authority to transfer to or from an agency outside the Department of the Interior with the consent of the outside agency. n354 Such "withdrawals," however, would have to comply with the withdrawal process established under section 204 of FLPMA, which includes compliance with the National Environmental Policy Act. n355

On the other hand, a decision to transfer a national monument to another agency after it has been established by proclamation might reasonably be viewed as a modification of an existing withdrawal, and this would seem to be more in line with the plain meaning of the terms "make" and "modify." If so, section 204(j) of FLPMA precludes the Secretary from transferring jurisdiction over national monuments.

The FLPMA withdrawal provisions can be avoided altogether if the President simply designates the current Interior Department management agency as the monument administrator in the proclamation establishing the monument. n356 Even assuming that Executive Order No. 6,166 would otherwise require the National Park Service to exercise some control over all such national monuments, Reorganization Plan No. 3 appears to authorize the Secretary to keep the management responsibilities with the existing management agency. n357 This was the approach taken, for example, [*533] in the proclamation setting aside the Grand Staircase Escalante National Monument n358 and Vermillion Cliffs National Monument. n359

Conversely, if the President wishes to have the National Park Service manage monument lands that were previously managed by another agency whether within the Department of the Interior or not he may use Executive Order No. 6,166 to accomplish that result since, unlike the Secretary, the President is not subject to the restrictions at section 204(j) of FLPMA. n360 This was apparently the basis upon which lands previously under the management of the Bureau of Land Management within the enlarged Pinnacles National Monument proclaimed by President Clinton were placed under the jurisdiction of the National Park Service. n361 Likewise, certain lands in the enlarged Craters of the Moon National Monument in Idaho were placed under the Park Service's authority, while other lands within the monument remain under the jurisdiction of the Bureau of Land Management. n362 The only limitation on this authority may be for United States Fish and Wildlife Service management of national wildlife refuges, since the National Wildlife Refuge Administration Act provides that lands within the refuge system "shall continue to be part of the System until otherwise specified by an Act of Congress." n363

Finally, if the President wants to leave the jurisdiction of monument lands with a non Interior agency, such as the United States Forest Service, he may either have to accept a limited role for the National Park Service, as was done with the Giant Sequoia National Monument, n364 or he may try to amend Executive Order No. 6,166 in the manner provided under the 1933 Reorganization Act, as was suggested by the 1934 Attorney General's Opinion. n365

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V. Judicial Review of Monument Decisions

a. jurisdiction to hear monument challenges

The United States Constitution vests in the President the power and responsibility to "take Care that the Laws be faithfully executed." n366 The judicial power, by contrast, "extends to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States . . . and to Controversies to which the United States shall be a party." n367 In *Marbury v. Madison*, the Supreme Court made clear that this language gives the judicial branch the authority "to say what the law is." n368 Nonetheless, in *Franklin v. Massachusetts*, n369 the Supreme Court held that the judicial review requirements of the Administrative Procedure Act (APA) do not apply to the President. n370 Thus, to the extent that the authority to review presidential decisions proclaiming national monuments rests upon the APA and its waiver of the federal government's sovereign immunity, *Franklin* might suggest that review of such decisions is unavailable.

As Professor Bruff has noted, the APA chapter on judicial review merely codified the existing law of nonstatutory equitable remedies such as mandamus, injunction, and declaratory relief. n371 Thus, reliance on the APA is not necessary to obtain equitable relief from presidential decisions, and limited review of presidential decisions has been allowed. n372 If the APA does not apply, then the court must [*535] determine the scope of judicial review for presidential decisions. n373 Since judicial review of non presidential agency decisions under the APA is highly deferential, n374 judicial review of presidential decisions should be at least as deferential. Nonetheless, if review is to be meaningful, the courts must be allowed to assess the record of the President's decision and determine whether the President's action is rationally related to the statutory authority and purpose. n375

In *Wyoming v. Franke*, n376 the United States District Court for the District of Wyoming reviewed the proclamation establishing the Jackson Hole National Monument under an "arbitrary and capricious" standard of review. n377 Although *Franke* was decided before the APA was enacted, the arbitrary and capricious standard that the court purports to follow is the same standard that would apply under the APA. n378 As construed by the *Franke* court, however, this standard is more deferential than the APA standard in concluding [*536] that a reviewing court may not question "the judgment of the officer as to the existence of the facts calling for the action." n379

A more recent decision from the United States District Court for the District of Columbia supports the *Franke* result. In *Tulare County v. Bush*, n380 the court considered this question in the context of an appeal from President Clinton's decision proclaiming the Giant Sequoia National Monument in California. n381 The court found that non APA review was available, but that its review authority was limited to the question of whether the President had "exercised his discretion in accordance with the standards of the Antiquities Act." n382 According to the court, review was limited to determining whether the President had properly exercised his discretion under the law. n383 The court found that it could not review "the President's determinations and factual findings." n384

b. standing and ripeness issues in challenges to monument decisions

Assuming that judicial review is available, a party seeking to challenge a monument decision still must demonstrate that they have standing to sue, and that the case is ripe for judicial review. In *Lujan v. Defenders of Wildlife*, n385 the Supreme Court set forth the "constitutional minimum" for standing. n386 First, a party must show [*537] "injury in fact." n387 Second, the injury must be traceable to the defendant's conduct. n388 Finally, it must be likely that the plaintiff's injury will be redressed by a favorable decision. n389

The ripeness doctrine is intended to avoid the "premature adjudication" of issues until an agency decision becomes final and "its effects felt in a concrete way by the challenging parties." n390 It requires a reviewing court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." n391 Monument decisions are final decisions, and thus the first prong of the ripeness doctrine will not likely prevent monument challenges. The standing test, and the second prong of the ripeness test, however, both require an assessment

of the impact of the agency action on the party initiating the challenge, and these may pose a more difficult hurdle for prospective plaintiffs.

Certain parties should have no difficulty obtaining judicial review of monument decisions. For example, an off road vehicle enthusiast, who is denied off road access to public lands because of the express language in a monument proclamation, likely suffers a sufficient injury and hardship to invoke the jurisdiction of the courts. On the other hand, a person who merely anticipates future problems because of a monument decision may face a more formidable obstacle. For example, a mining claimant who holds preexisting mining claims in a newly proclaimed national monument retains valid existing rights, which generally protect the miner's legal right to maintain and ultimately develop those claims. Such claimants may justifiably believe that their ability to mine inside the boundaries of the monument will be severely hampered, and perhaps even precluded, n392 by the monument designation. Nonetheless, such [*538] parties do not likely face a sufficient "imminent" injury or hardship to overcome standing and ripeness challenges until they have had their right to mine specifically curtailed by a subsequent agency decision. n393

VI. The Development of Monument Proposals in the Clinton Administration

The Antiquities Act received scant attention from the Clinton Administration until the reelection campaign of 1996. This changed in dramatic fashion on September 18, 1996 when, with little advance warning to Utah's governor and congressional delegation, President Clinton designated 1.7 million acres of land in southern Utah as the Grand Staircase Escalante National Monument. n394 The President's action was controversial in Utah and throughout the West, n395 but it proved to be enormously popular throughout the country, n396 and it set the stage for an unprecedented expansion of [*539] the national monument system. n397 During the final year of his Administration, President Clinton proclaimed twenty one new or expanded national monuments, ranging in size from the two acre Anderson Cottage in Washington, D.C., n398 to the million acre Grand Canyon Parashant National Monument in northern Arizona. n399 In total, Clinton added nearly six million acres to the national monument system. n400

While national monuments are created by presidential proclamation, the ultimate responsibility for President Clinton's stunning accomplishment goes to Secretary of the Interior Bruce Babbitt and his carefully engineered strategy to protect areas deemed worthy of national monument status. n401 Babbitt's strategy had both a procedural and substantive component. n402

a. the process for developing monument proposals

Following the Grand Staircase Escalante proclamation, calls to amend or repeal the Antiquities Act were common. n403 Much of the criticism was focused on the Administration's failure to consult adequately with state officials, and the statute's failure to establish a public process before a proclamation is issued. n404

To address this criticism, and to defuse efforts to amend or repeal the Antiquities Act, Babbitt committed to a three part process which he often described as a "no surprises" policy n405 before recommending new national monuments. n406 First, he expressed a [*540] willingness to personally visit any area that his office was considering for monument status. n407 Second, he agreed to meet personally with local officials and interested members of the public about different strategies for protecting the area under review. n408 Finally, he agreed to afford local members of Congress and senators the opportunity to adopt appropriate legislation to protect the area under consideration for national monument status before making a recommendation to the President. n409 This last concession resulted in legislation protecting several remarkable areas that would not likely have received congressional attention without indications from the Secretary that these areas were being considered for national monument status. n410

Besides adhering to these public initiatives, the Interior Department under Secretary Babbitt followed a strict internal process for developing monument proposals. Babbitt's ability to successfully promote protection of areas under the Antiquities Act depended on cooperation from the White House, and President Clinton obligingly sent Babbitt a letter requesting Babbitt's recommendations for areas deemed worthy of national monument status. n411 In accordance [*541] with Alaska v. Carter, n412 this insured that Babbitt's recommendations would not be subject to the NEPA process. n413 Freed from the burden of having to engage in a lengthy review process, Babbitt followed a standardized approach toward developing monument proposals, and preparing the necessary proclamation and background documents.

Developing proposals was not difficult. Babbitt's many years of experience in public life, and his longstanding interest in public lands, had put him into contact with the people who were likely to promote monuments, and the places where monuments might be proclaimed. n414 Moreover, the conservation community flooded Babbitt's office with various proposals, along with thousands of letters in support of them. For those proposals that appeared to have merit, and were politically feasible, the Secretary's office generally would make preliminary inquiries with local congressional representatives and state officials to gauge the degree of support or opposition that a proposal might engender. n415 If at this stage, or any other stage in the process, it appeared that legislative action to protect the lands was a possible option, the Secretary would pursue that avenue with the appropriate congressional representatives. The Secretary did not shy away from proposals that lacked broad support from the local political establishment, but local concerns [*542] were always part of the calculus. n416 Of particular concern to the Secretary was that he not force proposals that might unnecessarily threaten the Antiquities Act itself. n417

If a proposal passed through this filter, then the Secretary would usually schedule one or more visits to the site and associated communities. He would walk the ground and meet with local people, individually and publicly, to discuss their concerns and hopes for the lands. n418 Frequently, proposals would change during these encounters. n419

b. the preparation of monument documents

For proposals that remained viable after this public process, document preparation would begin. This included preparing a draft proclamation, developing maps to describe the area proposed for designation, and preparing appropriate background documents.

From the earliest history of the Antiquities Act, monument proclamations were written simply. They described, sometimes [*543] eloquently, but almost always briefly, those objects that were to be protected in the proclamation. n420 The Clinton era proclamations followed the trend begun under President Carter and the Alaska monuments of being somewhat more detailed than their predecessors. n421 They describe with particularity the "objects" to be protected. n422 They explicitly withdraw the lands from "all forms of entry, location, selection, sale, or leasing or other disposition under the public land laws," including the mining and mineral leasing laws. n423 They also typically "prohibit all motorized and mechanized vehicle use off road" in most circumstances. n424 Where appropriate, they also address whether the monument designation reserves water rights. n425 Otherwise, they follow the historical preference for simplicity.

Map preparation generally was entrusted to the appropriate land management agency, which usually had a good idea of the resources, potential resource conflicts, and topography of the area under consideration. Draft maps were prepared and studied, and potential conflicts or issues with other resources were identified. Conflicts were avoided to the extent possible by carefully drawing monument boundaries.

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In addition to preparing draft proclamations and maps, Babbitt's recommendations to the President included a detailed

memorandum describing the reasons for the recommendation, and including a bibliography of sources supporting the decision. n426 These were generally developed by Babbitt's staff in conjunction with experts from within and outside the agency familiar with the landscape. Press documents also were prepared that summarized the resources that were proposed for protection under the Antiquities Act. n427

When it appeared likely that a monument recommendation would be made, the Secretary's staff briefed the President's staff at the Council on Environmental Quality on the background of the proposal and the possible controversy that the proposal might engender. A recommendation was sent only after it had received tentative approval by the White House.

c. developing a monument recommendation

On the substantive side, Babbitt was willing to entertain a wide variety of proposals, but his penchant was for monument proposals that would protect large landscapes and unique ecosystems. And he viewed these concepts broadly to encompass landscapes of archaeological sites. n428 Babbitt also made the calculated risk that he could [*545] win approval and broad public support for a substantial number of new monuments by entrusting their management to the existing land manager, which in the case of many of the largest new monuments was the Bureau of Land Management. n429

The environmental community has long been skeptical of the Bureau's ability to manage lands for conservation purposes. n430 Historically, the Bureau had aligned itself with the ranching and mineral industry, earning the agency the derisive sobriquet "the Bureau of Livestock and Mining." n431 But Babbitt sensed that at least some within the Bureau were ready to assume the conservation mantle, and the monument initiative was just the vehicle to steer the agency in this new direction. n432

Babbitt chose to promote this initiative by establishing a new subagency within the Bureau of Land Management that is responsible for managing national monuments and other Bureau lands with a conservation focus such as wilderness areas. n433 The National [*546] Landscape Conservation System (NLCS) was designed to give the Bureau a conservation mission distinct from the other land protection agencies such as the National Park Service. The focus of the NLCS is on managing landscapes and ecosystems and eliminating incompatible uses. n434 In keeping with this focus, units of the NLCS provide opportunities for visitor use, but generally promote such use without visitor centers and other facilities in the monument itself. To the extent that such facilities are needed, they usually will be built in nearby communities or on the periphery of the monument. n435

The Bureau of Land Management also intends to allow a wider range of uses within its NLCS units to the extent such uses are consistent with other management authorities and, in the case of national monuments, with the proclamation establishing the monument. Thus, while new mineral development and new road construction generally is precluded in Bureau of Land Management monuments, hunting and grazing may continue to the extent that such uses are consistent with the management of the objects identified for protection in the proclamation. n436

It remains to be seen how such notions of multiple use will play themselves out in the context of monument management, especially under the leadership of a new administration which shows every sign of favoring more extractive uses on public lands, including national monuments. Certainly, some forms of hunting and recreational activities are compatible with the protection of some objects, and the proclamations generally leave the state game and fish departments in charge of regulating hunting and fishing activities. n437 But other uses, such as grazing, may be more problematic. Indeed, in two of the proclamations signed at the end of his term Kasha Katuwe Tent Rocks and Sonoran Desert President Clinton required the elimination of livestock grazing over much or all of the monument to promote the protection of these areas. n438 The Steens Mountain legislation also provides for elimination of certain livestock grazing, albeit

through the vehicle of land exchanges. n439 The proclamation for the Cascade Siskiyou National Monument in Oregon requires the Bureau to "study the impacts of livestock grazing on the objects of biological interest in the monument with specific attention to sustaining the natural ecosystem dynamics." n440 The study is now ongoing but could plainly lead to restrictions on grazing in the monument. n441

Authorizations for new rights of way across monument lands also may raise difficult questions. The broad language in the Clinton monument proclamations withdrew "[a]ll Federal lands and interests in land . . . from all forms of . . . disposition under the public land laws," which would appear to include new rights of [*548] way. n442 The memoranda from the Secretary that accompanied the recommendations to President Clinton typically addressed rights of way in a very general manner, noting that "[s]ome existing rights of way may include valid existing rights," but indicating that "[t]he exercise of such rights may be regulated to protect the purposes of the proposed monument, but any regulation must respect such rights." n443 New rights of way were not generally mentioned. n444 When the issue of new rights of way was raised squarely, however, in the context of the Sonoran Desert National Monument, the Secretary agreed to include an additional sentence in the memorandum which reads as follows:

Nothing in this draft proclamation precludes the issuance of new rights of way within existing right of way corridors, so long as the BLM determines, after NEPA compliance, that such rights of way are consistent with the purposes of protecting the objects for which the monument was established and the monument's management plan. n445

While it thus appears that new rights of way under strict conditions might be allowed in the Sonoran Desert National Monument, the [*549] absence of comparable language in all of the other memoranda may suggest a contrary intent for those monuments.

For all of the landscape level monuments, the Clinton proclamations sometimes required the management agency to prepare a management plan to address appropriate actions that are necessary to protect the objects identified in the proclamation. n446 Such plans likely will be prepared in accordance with the existing land use planning authorities of the various management agencies whether or not they are specifically required in the proclamation. n447 But the proclamations will clearly limit the management options that would otherwise be available, especially to agencies like the Bureau of Land Management. n448 The Bureau has established an Interim Management Policy for Newly Created National Monuments, n449 and has completed its management plan for the Grand Staircase Escalante National Monument. n450 If that management plan offers a glimpse into how the Bureau will manage its other monuments, then the agency appears to be well on its way toward achieving the transformation that Secretary Babbitt had promoted. n451

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VII. Abolition and Modification of National Monuments

The Congress of the United States has the constitutional responsibility to make all needful rules governing the public lands, n452 and there is no doubt that Congress may use this authority to alter or repeal monument designations created by the President. Yet, despite the controversy that frequently surrounds national monument designations, Congress has only rarely reversed or curtailed presidential decisions establishing national monuments. n453 Congress most often ratifies these presidential actions and builds upon them by expanding the protected area or upgrading its status to a national park. n454 This has been true even in those cases where an initial designation by Congress may have been inconceivable.

President Clinton's designation of the Grand Staircase Escalante National Monument offers an excellent example. Protection of this remote area of southern Utah has long been a priority for conservation groups, but the staunch opposition of the Utah congressional delegation made it highly unlikely that protective legislation would have been enacted. n455 After the monument was proclaimed, several unsuccessful attempts were made by Senator Robert Bennett and Congressman Jim Hansen to enact legislation to undo the decision. n456 Then, in 1998, Congress passed, and the

President signed, two pieces of legislation that appear to ratify the designation [*551] of the monument. The first was the Utah School and Land Exchange Act, which transferred approximately 176,000 acres of school trust lands located within the exterior boundaries of the Grand Staircase Escalante National Monument to federal ownership in exchange for a money payment and a transfer of other federal lands to the State of Utah. n457 Subsequently, Congress passed the Automobile National Heritage Area Act. n458 Title II of that law is entitled "Grand Staircase Escalante National Monument," and was designed to correct minor errors in the original proclamation and to make minor boundary adjustments. n459

Notwithstanding local opposition, monument designations are invariably popular with the general public, and it is perhaps for this reason that Congress has been reluctant to tamper with them once they have been proclaimed. Assuming then that congressional action to abolish or significantly diminish a monument is unlikely, does a future President have the authority to alter a predecessor's action to proclaim a national monument?

Whether a future President has the authority to abolish a national monument arguably resolves the question as to whether a President may reduce the size of a national monument or eliminate restrictions or conditions included in the proclamation, since the legal issues are essentially the same. Nonetheless, government officials and commentators alike generally have viewed these questions separately, n460 and accordingly they are addressed separately here.

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A. Abolishing national monuments by presidential action

The Antiquities Act authorizes the President "to declare by public proclamation" national monuments. n461 The statute is silent, however, as to a President's authority to modify or repeal such proclamations once they are issued. n462 In 1938, the Acting Secretary of the Interior proposed to President Franklin Roosevelt the abolition of the Castle Pinckney National Monument, which had been established by President Coolidge in 1924. n463 This proposal was referred to the Justice Department, which rendered a legal opinion by Attorney General Homer Cummins. n464 The Attorney General found that the President lacked the authority to abolish a national monument, stating:

The grant of power to execute a trust, even discretionally, by no means implies the further power to undo it when it has been completed. A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can. n465

According to the Attorney General, the Antiquities Act grants a limited delegation of authority to the President to proclaim national monuments. n466 It does not authorize the President to abolish them. n467 Once a monument is established by presidential proclamation, [*553] only the Congress is free to abolish it in accordance with its general power over public property. n468 To bolster this conclusion, the Attorney General noted that the Congress had expressly authorized the President to both make and revoke withdrawals in at least two other withdrawal statutes n469 but that no such authority was included in the Antiquities Act. n470

Nearly twenty years after the Interior Department proposal to abolish Castle Pinckney, Congress enacted legislation abolishing the monument, n471 and it has abolished nine other monuments over the course of the nearly one hundred year history of the Antiquities Act. n472 Since the Castle Pinckney proposal no President has proposed to abolish a monument on his own authority.

The idea that Congress granted the President "one way" authority to create, but not revoke or modify, national monuments is compelling not only when comparing the Antiquities Act with other withdrawal authority, but also when viewed from the perspective of the underlying purpose of the Antiquities Act. The impetus to pass the law came from

the concern that spectacular public land resources might be harmed before Congress could act to protect them. n473 To address this concern, the Antiquities Act gave the President limited authority to preserve certain public lands and their resources until Congress chose to take its own action. n474 Because Congress has the ultimate authority over public lands [*554] under the Property Clause of the Constitution, n475 it is free to undo or modify the President's action, albeit subject to a possible presidential veto. If the President, however, has the power to undo these protections before the Congress has a chance to act, a resource might be lost forever. Thus, it is both logical and appropriate to construe the Antiquities Act to allow a President to protect resources, but to deny a President the authority to undo those protections. n476

b. presidential modification of monument proclamations

Even assuming that the President lacks the authority to abolish monuments, can he nonetheless modify a monument by a proclamation that diminishes its size? n477 The analysis offered in the 1938 Attorney General's opinion suggests that a President may not modify a monument proclamation. n478 That opinion found that the President's authority under the Antiquities Act was limited to designation of monuments, and not to their revocation, in large part because the Congress did not grant the President revocation authority as it had done in other statutes. n479 One of the laws relied upon by the Attorney General to support this argument n480 specifically authorizes the President to "modify any Executive order . . . establishing any forest reserve, and by such modification . . . reduce [*555] the area or change the boundary lines of such reserve." n481 Thus, just as Congress denied the President revocation authority in the Antiquities Act, it also might be argued that it denied the President the power to modify monuments.

Notwithstanding this seemingly ineluctable conclusion, the 1938 Attorney General's opinion accedes to the past practice of some presidents to "diminish[] the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom under that part of the Act which provides that the limits of the monuments 'in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.'" n482 While the Antiquities Act contains the limitation referenced by the Attorney General, this language cannot rightfully be construed to authorize a future President to diminish the size of a monument. This conclusion follows from the fact that an original monument proclamation, by definition, represents the judgment of a president that the area protected is the "smallest area compatible with the proper care and management" of the protected objects. n483 Otherwise the proclamation would be invalid on its face. Indeed, all of the proclamations issued during and after the Carter Administration specifically state that the area protected is "the smallest area compatible with the proper care and management of the objects to be protected." n484 Thus, allowing a new President to reverse the considered judgment of a prior President regarding the size of a national monument is not simply correcting a mistake in an original proclamation to conform to the narrow language of the statute. Rather, it allows the new President to exercise a power not granted under the Antiquities Act, namely the power to reverse the judgment of a prior President and modify a monument proclamation. Just as the Attorney General determined that the Antiquities Act delegates a limited power authorizing presidents to create but not [*556] revoke monuments, n485 so too the law must be construed to limit a President's power to diminish a monument.

Of course, if a future President can demonstrate that a past proclamation lacks sufficient specificity to accurately identify the lands to be protected, then a clarification of an original proclamation might be in order. n486 Likewise, if a future President can demonstrate that a mistake was made in a previous proclamation as, for example, where the objects protected plainly did not require the withdrawal of particular lands, or were located outside the monument boundaries, then a modification clearly should be sustained. But where a President exercises his discretion, lawfully including particular lands within the boundaries of a national monument, that decision can be reviewed by an appropriate federal court n487 or altered by Congress. However, it should otherwise be immune from presidential second guessing.

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Construing the Antiquities Act to deny a President the power to diminish a national monument conforms to the underlying policy of the law that public lands are held in trust for the entire nation. n488 The Antiquities Act was adopted

because of congressional concern that objects might be lost before they could be protected by the Congress. n489 To address that concern, the Congress authorized the President to protect objects, but not to remove such protection once put in place. n490 While this one way policy might temporarily result in more protection than Congress ultimately deems necessary, it ensures that objects considered worthy of protection by one President do not lose that protection until the Congress decides otherwise. An interpretation of the Act that allows a President to remove protections once they are in place defeats the statute's policy in favor of protection.

While the 1938 Attorney General's opinion briefly acknowledged the past practice of some Presidents to diminish the size of national monuments, the legality of that practice was not before the Attorney General. n491 Several opinions from the Interior Department Solicitor's Office, however, squarely confront this question. n492 The issue arose most prominently in the early history of the Antiquities Act in the context of the decision of President Woodrow Wilson to reduce, by approximately half, the size of the more than 600,000 acre Mount Olympus National Monument that Theodore Roosevelt created. n493 Three weeks before Wilson issued his proclamation eliminating half the monument, the Solicitor issued an opinion approving the decision. n494 The Solicitor's 1915 opinion relied substantially on an 1892 opinion of the Assistant Attorney General dealing with the President's authority to restore forest reserves to the public domain [*558] after the lands had been designated under the General Revision Act of 1891. n495 That statute authorized the President to "set apart and reserve [forest lands] as public reservations." n496 The Assistant Attorney General found that the "language of the section, and the theory which prompted the [forest reserve] legislation, seem to have recognized that said reservation might be temporary or permanent, as, in the discretion of the President, the good of public service might demand." n497 The Assistant Attorney General's 1892 opinion [*559] is suspect for its heavy reliance on an 1855 court opinion involving the Rock Island Military Reservation that had been thoroughly and unequivocally rejected by Attorney General Edward Bates in 1862, n498 a position that was reaffirmed in an 1878 opinion of Attorney General Charles Deven. n499 Indeed, the 1892 opinion never mentions the 1862 or 1878 Attorney General opinions. n500 To its credit, the 1915 Solicitor's opinion acknowledged these opinions but found them unpersuasive because they "rested somewhat on the premise that the President had no power to withdraw or reserve public lands in the absence of specific authority from Congress." n501 The problem with this argument is that the reservations involved in both the 1862 and 1878 cases were made pursuant to a specific congressional authorization, and the Attorney General had found that this authorization granted the power only to reserve the lands and not to modify those reservations. n502 In this sense, the 1862 and 1878 cases were much like the situation presented with the Mount Olympus National Monument, which was created in accordance with an express congressional delegation under the Antiquities Act.

Less than ten years after the Mount Olympus opinion, the Solicitor once again faced the question of the President's authority to reduce the size of national monuments, this time in a proposal to restore lands from the Gran Quirva and Chaco Canyon National Monuments to the public domain. n503 In a 1924 opinion, the Solicitor [*560] relied substantially on a 1921 Attorney General opinion n504 in concluding that the restoration of national monument lands to the public domain was "unauthorized." n505 The opinion recommended that, when a President wants to reserve lands for a national monument but is unable to fix specific boundaries, he should temporarily withdraw the lands under the Pickett Act of 1910 n506 because that law specifically authorized the modification of reservations. n507 After a national monument is established, however, "it becomes a fixed reservation subject to restoration to the public domain only by legislative act." n508

The Solicitor reversed himself again in a 1935 opinion, n509 and later confirmed this view in a 1947 opinion. n510 The 1935 opinion acknowledges that it appears to be inconsistent with "a series of rulings by the Attorney General." n511 Nonetheless, the Solicitor argued that these rulings could be distinguished because they involved military reservations. n512 He then offered two additional arguments to support his conclusion that the President may reduce [*561] the size of monuments. First, he argued that the President has implied power under *United States v. Midwest Oil Co.* n513 to create and reduce executive withdrawals, n514 including national monuments created under the Antiquities Act. n515 The President's implied authority to reserve lands, recognized by the Supreme Court in *Midwest Oil*, was expressly repealed by Congress in 1976. n516 Even if it had not been repealed, it seems unlikely that a court would recognize the implied authority of a President to undo something that could only be accomplished by statute in the first instance. n517

The second argument offered by the 1935 Solicitor's opinion to support the President's authority to reduce the size of the monument is the language in the Antiquities Act, referenced in the 1938 Attorney General's opinion, n518 which limits withdrawals to the "smallest area compatible with the proper care and management of the objects to be protected." n519 As noted previously, n520 this language might support a President's decision to fix boundaries that are found to be indeterminate, or to correct a mistake that might have been made in an original proclamation regarding the legal description of the land. But a construction that would allow a future President to effectively reverse the discretionary judgment of an earlier President wholly undermines the one-way protective license granted by the Antiquities Act. A review of the facts surrounding the Mount Olympus monument—the very case that precipitated the 1935 Solicitor's opinion—demonstrates why the Antiquities Act ought not to be construed to allow presidents to modify monument proclamations.

The original Mount Olympus National Monument proclamation signed by Theodore Roosevelt describes "the slopes of Mount [*562] Olympus and the adjacent summits of the Olympic Mountains" as embracing "objects of unusual scientific interest" including "numerous glaciers" and "the summer range and breeding grounds of the Olympic elk." n521 Woodrow Wilson's amended proclamation indicates that the objects to be protected by the original proclamation were the glaciers and the Olympic elk, and that these were adequately protected by a monument half the size of the original proclamation. n522 While Wilson's characterization of the scope of the original proclamation may be correct, it might also be argued that Roosevelt had intended to protect the slopes of the Olympic Mountains, and that the glaciers and elk were merely examples of the scientific objects to be protected. More importantly, however, the Solicitor's claim that the area of the original monument was, in the opinion of the Interior and Agriculture Departments, "larger than necessary for the protection of the summer range," n523 is not supported by the record. On the contrary, elk were apparently given little, if any, consideration in deciding to reduce the size of the monument. One historian who has written about this period noted that "[t]he needs [*563] of the elk had never even come up for discussion." n524 What now seems clear is that the size of the monument was reduced not because President Wilson decided that the "objects" identified in the proclamation did not require the additional lands for their protection, but because of the intense lobbying pressure by the mining n525 and logging n526 industries. It is likewise clear that the decision was made, at least in part, to placate the Forest Service, which wanted these lands restored to forest preserve status so that they could be made available for logging. n527 To be sure, had Wilson been acting in the first instance to reserve the lands around Mount Olympus, a more limited proclamation might well have been justified. But the larger monument proclaimed by Teddy Roosevelt was almost certainly within Roosevelt's discretion under the Act. Once Roosevelt acted, future presidents lacked the authority to undo his decision.

Following the monument's reduction, eighty-five percent of the land that remained was unforested alpine terrain. n528 Conservation [*564] groups described the Wilson proclamation as the "rape of 1915." n529 When the Mount Olympus National Monument was transformed into the Olympic National Park in 1938, n530 much of the land that President Wilson took out of the monument was put back into the park, n531 suggesting that this land did indeed encompass objects worthy of preservation.

The other most significant example of a presidential action to reduce the size of a national monument involved the Grand Canyon. Congress had designated the Grand Canyon as a national park in 1919, but in 1932 Herbert Hoover designated 273,145 acres of additional land along the west boundary of the park as the Grand Canyon National Monument. n532 The new monument aroused strong opposition among ranchers who wanted the land for grazing, and among local county officials who were concerned about the loss of their potential tax base. n533 Several bills were introduced into the Congress that would have reduced the size of the monument by as much as 150,000 acres, and one bill actually passed both houses of Congress only to be vetoed by Franklin Roosevelt because of his concerns that the proposal had not been fully vetted. n534 After further investigation, and on the recommendation of Secretary of Interior Harold Ickes, Roosevelt signed a proclamation reducing the size of the monument by 71,854 acres. n535

While the Interior Department's investigation was designed to insure the preservation of all of the essential features that had led Hoover to designate the area as a monument in the first place, the ultimate decision to exclude certain lands

by proclamation was a concession to political concerns, and was not made on the basis of an [*565] assessment that the reduced area was the "smallest area compatible with the proper care and management of the objects to be protected." n536 The Antiquities Act does not authorize the President to make the political choice to reduce the size of a monument. n537 Rather, as the Attorney General has repeatedly found, that choice is reserved for the Congress. n538

There have been at least six other examples of monuments that were reduced in size, although in many cases the reductions were relatively minor. n539 More recently, Secretary of the Interior Gale Norton has written to various states to inquire whether the Interior Department should recommend boundary adjustments to national monuments, n540 and thus the question of a president's authority to diminish the size of a national monument may arise yet again.

Unquestionably, different people and different experts may have different opinions about what lands are needed to protect particular resources. But the decision to protect a particular tract of land instead of another tract involves an exercise of discretion in much [*566] the same way that a decision to proclaim a monument involves an exercise of discretion. n541 This is especially true for monuments that protect objects such as free-roaming wildlife and wildlife ecosystems. Future Presidents may disagree with the judgment made by their predecessors, either to establish monuments or to include particular lands within their boundaries. But their recourse, and the recourse of other citizens unhappy with such decisions, is in the Congress, or perhaps in the courts on the grounds that the President abused his discretion. It is not in the executive branch. The intentional and rational design of the Antiquities Act is to make it easier to designate national monuments than to alter their status. The objects preserved under the Antiquities Act often took many millennia to create. Their destruction if that is to be their fate can wait the few years that it might take to reach agreement between some future Congress and the President.

c. modification of monument restrictions

Even assuming that the 1938 Attorney General's opinion and the 1935 Solicitor's opinion are correct in authorizing presidential modification of national monuments, that support is limited to boundary adjustments that are necessary to reflect "the smallest area compatible with the proper care and management of the objects to be protected." n542 As suggested above, at least some boundary modifications for national monuments were made without primary regard for the objects that were supposed to be protected by the proclamation. n543 Moreover, the arguments for and against allowing changes to monument boundaries do not necessarily encompass the [*567] entirely different question that arises where a President seeks to change the scope of protection afforded by a particular proclamation.

Although no President has attempted to eliminate or reduce the use restrictions imposed in a prior proclamation, this issue has come to the forefront recently as a result of particular protections that were included in some of the landscape monuments that President Clinton proclaimed. In all of the Clinton proclamations, for example, the federal lands within the boundaries of the monument were withdrawn from all forms of mineral development, including hard rock mining and mineral leasing. n544 Nonetheless, the Bush Administration has suggested that it will be looking at some of these monument lands for possible oil and gas development. n545

For the same reasons that Presidents lack the authority to abolish or diminish a monument, absent a demonstration of mistake, so too do they lack the authority to unilaterally remove restrictions imposed by a predecessor. Consider, for example, the restrictions on grazing included in the Sonoran Desert National Monument. Under the proclamation, President Clinton found that an area within the new monument that was part of the Barry Goldwater Air Force Range, saw limited public access, had no livestock grazing for nearly fifty years, and had achieved a remarkable level of biological diversity when compared with adjacent and similar lands that had been subject to grazing. n546 In an effort "to replicate and extend the extraordinary diversity and health" of this area, the President provided that existing grazing leases on adjacent lands in this part of the monument should not be renewed when their current terms expire. n547

A future President might well disagree with President Clinton's judgment that elimination of grazing was necessary or appropriate to protect the objects identified in the proclamation. But it is [*568] unlikely that a future President could show that Clinton's judgment was a mistake, in the sense that the objects to be protected would not benefit from the elimination of livestock grazing. Allowing a future President to unilaterally reverse restrictions included in a monument proclamation because of a different judgment about the need for that restriction is no different in kind from allowing a future President to abolish a monument because of a different judgment about the need for the monument itself.

As discussed above, a claim that certain lands are not needed to protect the objects of scientific interest designated in a proclamation may be subject to judicial review on the grounds that a President abused his or her discretion. Likewise, a person may be able to seek judicial review of restrictions imposed in a proclamation on the grounds that those restrictions are not needed to protect the objects designated in the proclamation. n548 Finally, Congress may choose to change the protections that are accorded in a presidential proclamation. The Antiquities Act, however, does not grant a President the power to revoke or modify a proclamation that was previously made.

VIII. Amending or Repealing the Antiquities Act

In 1970, the Public Land Law Review Commission (PLLRC) recommended the repeal of the Antiquities Act, along with all of the other executive branch authority to reserve public lands. n549 When Congress enacted FLPMA in 1976, it accepted virtually all of the recommendations of the PLLRC with respect to withdrawals. n550 The [*569] notable exception was its decision not to repeal the Antiquities Act. n551

More recently, several bills have been introduced into the Congress to amend the Act, n552 and some recent scholarly commentary on the Antiquities Act supports reforms that would incorporate modern notions of public process. n553 Critics of the Antiquities Act argue that, at a minimum, law ought to incorporate notice, comment, and consultation opportunities, and that proposals should be [*570] evaluated in accordance with the National Environmental Policy Act before they are made. n554 One commentator has gone so far as to suggest that monuments created without adequate process are "forever tarnished" because they run contrary to basic principles of wilderness ethics. n555 Some have also argued that the Antiquities Act should be repealed because the withdrawal authority contained in FLPMA is more than adequate to protect public lands and resources that are at risk of damage or destruction. n556 While these arguments have superficial appeal, they do not withstand close scrutiny.

a. the need for a public process

Local politicians often express indignation about the President's failure to involve the public especially the local public before proclaiming a new national monument. n557 But the Antiquities Act [*571] is hardly unique in denying the public an opportunity to participate in government decisionmaking. For example, while the Administrative Procedure Act generally requires a notice and comment procedure for legislative actions such as rulemaking, n558 it expressly provides that an agency may forego such procedures when it finds "for good cause . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." n559 Agencies frequently invoke this exemption, n560 which was designed to apply where public process "might defeat legitimate agency goals," n561 for example, where swift action is needed to address an extant problem. n562

Nonetheless, several arguments might be advanced for requiring public process in the development and approval of monument proposals. First, a public process helps promote democratic values by giving a voice to affected constituencies. Second, a public process can help assure that government officials are better informed about the consequences of

their actions, thus fostering better decisions. Finally, a public process can help achieve the virtues of civic [*572] republicanism. n563 As argued below, however, none of these reasons is compelling in the context of national monument designations. n564 Because a mandatory public process likely would hamper the ability of future Presidents to use the Antiquities Act, adding such a process would be a serious mistake.

1. Promoting Democratic Values. The notion that public participation in agency decisionmaking is the "right" of every citizen is often invoked to support public participation in monument decisions. n565 Yet, far from a right, public participation in agency decisions is a relatively recent phenomenon that historically was not deemed necessary to the effective operation of the American government. n566 Nonetheless, it might be argued that public participation advances democratic values by promoting majority rule. But if this were the sole virtue of public participation, then such participation actually might prove antithetical to the American system of government, which was carefully designed to avoid a "tyranny of the majority." n567

[*573]

Under our republican form of government, the voting public democratically elects their representatives who are charged with promoting the greater public good. n568 If the public is dissatisfied with their representatives' decisions, it may vote those representatives out of office, but it may not at the federal level vote for an alternate course of action. n569 Moreover, even if the public were allowed to vote on a complex question like whether and to what extent a President should designate a national monument, Arrow's theorem demonstrates that it is unlikely that the outcome would reflect the will of the majority. n570 Thus, allowing the public to participate in a decision to designate a national monument will not necessarily promote either rational decisions or democratic values.

2. Fostering Better Decisions. The most compelling reason for requiring public participation is that it fosters better decisions by informing agency officials of the possibly unforeseen consequences of their actions. While federal agencies may have a reasonable grasp of the resources within a monument and the manner in which they might best be protected, local officials and members of the public might well have additional information regarding the resources that would be valuable in deciding the extent to which lands should receive Antiquities Act protection. Still, in the context of monument designation, this reason is far less compelling than for other types of agency decisions. This is because public land [*574] resources necessarily must be managed for the long term, n571 and a monument designation, at most, merely preserves the resources within the monument as they were at the time of the designation. Existing resource users within monument boundaries generally hold valid existing rights, which allow them to maintain these uses. n572

Moreover, monument proclamations often allow new public land uses even extractive uses to continue. n573 Thus, while the Congress may ultimately decide that some or all the lands placed under monument status are better suited to nonmonument uses, the temporary protection of these lands and resources in a national monument preserves, rather than limits, the options available to the Congress in deciding on the long term management of those lands. By contrast, if a president is forced to delay monument decisions to allow for public process, some of those decisions are likely to become politicized, and monument worthy resources might be lost before a proclamation can be issued, thereby limiting Congress's long term management options. n574 In addition, while local officials and citizens may have more knowledge about local resources, their views on protecting resources of national significance may reflect personal and economic interests that will be affected by a monument designation rather than the broader interests of all citizens.

To be sure, minimal process requirements such as prior notice to appropriate state and local officials and the general public that a [*575] monument proposal is under consideration, along with a brief opportunity for public comment, would not likely impose a substantial impediment to the operation of the law, and might allow the President to avoid unintended conflicts and secure stronger political support for the proposal. But if the process is made too cumbersome by requiring, for example, extensive studies and affording appeal rights beyond those allowed under current law, n575 legitimate proposals almost certainly will be derailed, not on their merits, but rather because of the political baggage that a long process likely would heap on such proposals. Indeed, the history of the Antiquities Act is replete with examples of monument proclamations that are universally acclaimed today, but that might have been abandoned if Presidents were

forced to allow local politicians to play a more prominent role in the decisions. n576

3. Achieving the Virtues of Civic Republicanism. A final reason that might be offered for allowing public participation is that it achieves the virtues of civic republicanism, n577 a political philosophy that traces its roots to Thomas Jefferson. n578 The American political system reflects both pluralist and republican ideals. n579 Pluralist principles, which promote the efforts of various individuals and interest groups to lobby political officials to achieve their political ends, are utilitarian. n580 They "place no premium on political participation" and thus support the presidential designation of [*576] national monuments under the current political regime. n581 Cass Sunstein, however, has noted some of the problems with pluralism, including that interested parties may have objectionable preferences that under the pluralist system become just as legitimate as unobjectionable preferences. n582 Furthermore, interested parties may have disparate power and influence, thereby skewing the market-like results that pluralism is designed to achieve. n583

Sunstein describes the republican approach as requiring a commitment to the following four principles: (1) deliberation, where private interests are considered, but which ultimately give way to the virtuous political choice; (2) political equality among interested parties; (3) universalism, or agreement that the common good reflects the right political choice; and (4) citizenship, which manifests itself primarily in the public's right to participate in decisionmaking. n584

While Sunstein offers a compelling portrait of the republican ideal, the realities of political decisionmaking generally do not reflect this ideal. In the real world, private interests frequently obscure the public good and the virtuous choice. Interested parties rarely have equal power. Instead, influence is wielded by those who make campaign contributions or have political connections. While most probably would agree that the right political choice should reflect the common good, public views about what constitutes the common good are so disparate as to render this principle meaningless to decisionmakers. Finally, while in the ideal world citizenship might manifest itself through public participation, in the real world, public participation is often offered to promote the private interests of the commenter, rather than the interests of the entire citizenry. [*577] Efforts by "civic environmentalists" to overcome this problem by promoting the participation of average citizens rather than professionals most likely exacerbates rather than solves this problem. n585

This does not mean, of course, that public participation is inherently bad. At a minimum, it affords a means for venting important issues before decisions are made. It does suggest, however, that public participation should not be allowed, or at least should be carefully regulated, when it has the potential to undermine the common good by interfering with the Government's capacity to make decisions that are designed to promote the public interest.

For example, the argument that national monument proposals should be subject to basic notice and comment requirements seems unobjectionable on its face. Yet a review of the controversies surrounding past monument proclamations suggests that elaborate notice and comment procedures very well might have thwarted the President's ability to proclaim monuments under the authority of the Antiquities Act. n586 And the risk becomes greater as additional process requirements, such as environmental impact statements and cost-benefit analyses, n587 are imposed.

The purpose of the Antiquities Act is to insure that public lands and resources are protected before they suffer damage or destruction. n588 Requiring process before these protections are in place can have the effect of targeting a resource in a manner that attracts the very damage that the proclamation is designed to prevent. n589 FLPMA authorizes temporary withdrawals for up to three years, [*578] and these usually can be carried out with minimal process. n590 Such temporary withdrawals certainly should be used whenever resources are at risk pending consideration of a monument proposal, or any other proposal to withdraw lands. But calling attention to a monument proposal through a lengthy public process significantly increases the risk that local political issues and pressures will overwhelm the public interest and prevent the designation of monuments which, in hindsight, are almost always universally accepted as being in the public interest.

This concern is not speculative. If past actions under the Antiquities Act had required a substantial public process in advance of national monument proclamations, mining and political interests might have stopped the designation of the Grand Canyon National Monument, n591 mineral and timber interests might have prevented the designation of the Mount Olympus National Monument, n592 and grazing interests might have persuaded Franklin Roosevelt against designating the Jackson Hole National Monument, n593 which now comprises a substantial portion of the Grand Teton National Park. n594 More recently, the Utah political establishment might have succeeded in blocking the Grand Staircase-Escalante National Monument. At a minimum, all of these decisions likely would have been tied up in process for many years at the expense of other actions. Opportunities for judicial review would proliferate. The public interest would not have been served.

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Of course, even if the law does not require process, nothing prevents a President or his subordinates from providing it, n595 and the political success of future decisions may well require it. As previously described, following the Grand Staircase-Escalante decision, Secretary Babbitt adhered to a specific and effective public process for deciding whether to recommend new national monuments to the President. n596 Arguably, the public's approval of these monument decisions was at least partly attributable to the Secretary's willingness to engage interested parties and, where appropriate, address their concerns in his recommendations. n597

Secretary Babbitt's approach to process sets a benchmark for future executive branch officials considering Antiquities Act proclamations, and they might find it expedient to follow his lead. But mandating a cumbersome process runs a substantial risk of denying or at least delaying the protection of important public land resources.

By any measure, but most certainly from a historical perspective, the Antiquities Act has worked exceedingly well, notwithstanding its failure to impose on the President any process requirements. For that reason, perhaps more than any other, the law should be left alone. n598

Perhaps, one might argue, the delays and obstructions that will result from affording a fair process are simply costs of living in a free society. But is it really necessary that we bear these costs? Since all a President can do with an Antiquities Act proclamation is [*580] preserve the status quo of the lands n599 at the time of the proclamation, why not allow such preservation without process? If our most precious public land resources are destroyed, they are lost to us forever. Why not embrace a law that follows the precautionary principle n600 and errs on the side of protecting these resources with no questions asked, until Congress takes the opportunity to review the decision? And why not insist that, if there is to be a public process, the process be accommodated by the legislative branch where the ultimate responsibility for public land management lies? n601 Congress can, and for more than half of the monuments has, assumed responsibility for national monument decisions by enacting legislation, frequently by converting the monument to a national park. n602 More often than not, this legislation expands upon the protections imposed by the President. n603 The history of the Antiquities Act is one of overwhelming and enthusiastic public support for [*581] the national monument decisions, even among those who originally may have opposed the designations. n604 Any risk to the public interest comes from a process that hampers the President's ability to designate national monuments. There is little risk that such designations will harm it.

b. flpma withdrawals as a substitute for antiquities act proclamations

FLPMA authorizes the Secretary of the Interior to "make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section." n605 FLPMA withdrawals in excess of 5,000 acres may be made for more than twenty years, n606 and are subject to detailed procedural requirements, including a requirement that the Secretary furnish the appropriate congressional committees with a detailed report on the withdrawal. n607 In addition, FLPMA withdrawals are subject to full NEPA compliance. n608 Thus, the objections to adding procedural requirements to the Antiquities Act process applies with greater force to the more cumbersome procedural requirements for FLPMA withdrawals.

The cumbersome process aside, however, FLPMA's twenty year maximum withdrawal is simply an inadequate substitute for the more permanent reservation authorized under the Antiquities Act. The most important Antiquities Act proclamations are often among the most controversial. n609 The prospect that such withdrawal [*582] decisions will be subject to executive branch review and politically charged proceedings every twenty years, and furthermore that a withdrawal might lapse even temporarily because of a future Secretary's deliberate or careless failure to ensure timely review of an existing withdrawal, makes FLPMA withdrawals far less protective than national monument proclamations.

In addition to their lack of permanence, FLPMA withdrawals lack the requisite status as conservation units to command the public's support. n610 The public recognizes national monuments as important resources to be protected. n611 But there is virtually no corresponding recognition of the importance of the lands protected by FLPMA withdrawals. To the extent that the public recognizes withdrawn lands at all, it usually is because the land management agency has given the land a special designation under its land use planning process. n612

IX. Conclusion

The Antiquities Act has been controversial throughout its history, n613 and it is not surprising that President Clinton's resurgent use of the law has sparked renewed calls for its repeal or modification. n614 Congress should resist these efforts. Perhaps the best reason is that the Antiquities Act has worked so well. It has given our nation and its people a conservation legacy that is the envy of other nations. n615 Our nation would be poorer much poorer if the mining, logging, and livestock industries had succeeded in blocking the creation or expansion of the Grand Canyon National Monument, [*583] the Jackson Hole National Monument, or the Mount Olympus National Monument, to name just a few of the controversial monuments that might never have been designated or expanded. And that legacy was possible only because the law works simply and in one direction, authorizing the President to protect land, and leaving it to the Congress to decide whether to lessen, or perhaps strengthen, those protections.

It is hardly surprising that some opponents of the law, recognizing that its repeal is unlikely, have pressed to amend the law to include a cumbersome public process. n616 They understand that process can be used to delay, obfuscate, weaken, and perhaps even defeat new proposals. To be sure, process is just as important in developing public land policy as it is in other areas of political decisionmaking. But examples of agencies eschewing process to serve the greater public interest abound, and in the context of national monuments, which protect critical public resources, any process can and should be accommodated after the designation has been made. The presumption should be as it is under the Antiquities Act n617 that the protection of public resources is paramount, and that any error, if one is to be made, should be made on the side of preservation.

If we as a society regret a decision to designate a national monument, n618 that decision can be undone. n619 But a decision to leave an area open to development may mean that spectacular resources will be lost to our nation forever. Just ask the spirits of Glen Canyon. n620

[*584] [figure] [*585] [figure] [*586] [figure] [*587] [figure] [*588] [figure] [*589] [figure] [*590] [figure] [*591] [figure] [*592] [figure] [*593] [figure] [*594] [figure] [*595] [figure] [*596] [figure] [*597] [figure] [*598] [figure] [*599] [figure] [*600] [figure] [*601] [figure] [*602] [figure] [*603] [figure] [*604] [figure] [*605] [figure] [*606] [figure] [*607] [figure] [*608] [figure] [*609] [figure] [*610] [figure]

FOOTNOTES:

n1 Proclamation No. 6920, 3 C.F.R. 64 (1996). It was no accident that Clinton chose to announce the

establishment of the new Utah monument in Arizona. Clinton narrowly lost Arizona in the 1992 presidential election, but won the state in 1996. *Electoral Votes by State, 1789–1996*, available at http://www.archives.gov/federal_register/electoral_college/votes_index.html#state (last visited Feb. 8, 2003). Utah went to the Republican candidates in both elections, and was never seriously contested. *Id.*

n2 16 U.S.C. §§ 431–33 (2000).

n3 See generally, e.g., Carl Pope, *Earth to Congress*, Sierra Magazine, May/June 1997.

n4 See *infra* notes 92–110 and accompanying text.

n5 On several occasions when Babbitt encountered President Clinton he would hand him an index card. Paul Larmer, Mr. Babbitt's Wild Ride, *High Country News*, Feb. 12, 2001, at 1. On one side of the card Babbitt listed the monuments created by Theodore Roosevelt, and on the other side were those created by Clinton. *Id.* During his three years in office following passage of the Antiquities Act, Roosevelt created eighteen national monuments encompassing approximately 1.5 million acres. See *infra* Appendix. Ultimately, Clinton surpassed Roosevelt's record by proclaiming nineteen new monuments and expanding three more, thereby designating nearly six million acres of new land as national monuments. *Id.*

n6 As noted above, Roosevelt designated eighteen monuments covering approximately 1.5 million acres of land. Roosevelt, of course, was also known for the large scale forest land withdrawals that he made under the General Revision (Forest Reserves) Act of 1891, also called the Creative Act of 1891. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103, repealed by 90 Stat. 2792 (1976). Clinton's twenty-two monuments encompassing nearly six million acres are in some ways more remarkable than Roosevelt's, because Roosevelt was setting aside areas at a time when far fewer people had settled the West, and the population centers and political power were primarily in the East. Moreover, Clinton's land legacy was hardly limited to monument proclamations. See *infra* notes 239–46 and accompanying text. Indeed, as described below, several significant legislative acts protecting large tracts of land were negotiated at the end of the 2000 legislative session, in large part because of the threat that a monument would otherwise be proclaimed. See *infra* notes 237–46 and accompanying text. Most notable, because of its size and unique character, is the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, which encompasses 84 million acres of submerged lands. Exec. Order No. 13,196, 66 Fed. Reg. 7,395 (Jan. 18, 2001). In addition, in one of the last acts of the Clinton Administration, the Forest Service issued a rule protecting 58.5 million acres of roadless lands in our national forests. 66 Fed. Reg. 3,245 (Jan. 19, 2001).

n7 Nine of these monuments were proclaimed during the waning hours of the Clinton Administration. See, e.g., Proclamation Nos. 7392–7399, 66 Fed. Reg. 7,335–7,367 (Jan. 17, 2001); Proclamation No. 7402, 66 Fed. Reg. 7,855 (Jan. 19, 2001). Citations to all of the monument proclamations are set forth in the Table attached as an Appendix to this Article. See *infra* Appendix.

n8 Roosevelt was president for less than three years after the Antiquities Act was passed, and his eighteen monuments were important not only because of the lands they protected but also because of the precedent that his efforts set for future presidents. The only other president whose Antiquities Act decisions might compare with Clinton's was Jimmy Carter, who still holds the record for protecting the most land. See *infra* Appendix. Carter's proclamations were remarkable, but they were limited to a single set of decisions designed to protect certain Alaskan lands from development pending Congressional action. See *infra* notes 180–216 and accompanying text.

n9 John Leshy, who served as the Interior Department Solicitor during the full eight-year tenure of President Clinton and Secretary Babbitt, has described more generally the long tradition of public lands protection by the executive branch. See generally John Leshy, *Shaping the West: The Role of the Executive Branch*, 72 U. Col. L. Rev. 287 (2001).

n10 See, e.g., James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. Colo. L. Rev. 483, 562 (1999); John F. Shepherd, *Up the Grand Staircase: Executive Withdrawals and the Future of the Antiquities Act*, 43 Rocky Mtn. Min. L. Inst. 4–1, 4–37 to 4–43 (1997) (discussing past efforts to amend or

repeal Antiquities Act and Act's future); see also National Monument Fairness Act of 1997, S. 477, 105th Cong. (1997) (requiring that all monuments in excess of 5000 acres are approved in advance by Congress); Public Lands Management Participation Act of 1997, S. 691, 105th Cong. (1997) (requiring opportunity for public involvement in formulation of plans relating to declaration of National monuments); National Monument Fairness Act of 1997, H.R. 1127, 105th Cong. (1997) (requiring that any National monument proclamation that protects more than 50,000 acres "shall cease to be effective two years after issued unless approved by Congress").

n11 See *infra* notes 20–70 and accompanying text.

n12 See *infra* notes 71–265 and accompanying text.

n13 *Id.*

n14 See *infra* notes 206–548 and accompanying text.

n15 *Id.*

n16 See *infra* notes 549–612 and accompanying text.

n17 U.S. Const. art. IV, § 3, cl. 2. This argument was specifically rejected, however, in two recent decisions from the United States Court of Appeals for the District of Columbia Circuit. *Tulare County v. Bush*, 306 F.3d 1138, 1142–43 (D.C. Cir. 2002); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136–37 (D.C. Cir. 2002).

n18 See *infra* notes 565–70 and accompanying text.

n19 The most prominent land management agencies are the United States Forest Service, the Bureau of Land Management (BLM), the National Park Service, and the United States Fish and Wildlife Service. George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. Colo. L. Rev. 307, 308 (1990). The Forest Service and BLM manage land under broad organic legislation enacted by the Congress. 16 U.S.C. §§ 1600–1614 (2000); 43 U.S.C. §§ 1701–1784 (2000). Professor Coggins notes that, while the Park Service has only partial planning authority, and the Fish and Wildlife Service has more, both agencies "routinely prepare land use plans." Coggins et al., *supra*, at 308.

n20 16 U.S.C. § 431 (2000). In addition to this provision, the Antiquities Act authorizes the Secretary of the Interior, Agriculture, or Army to issue rules and require permits from persons excavating archaeological sites or gathering objects of antiquity, on lands under the jurisdiction of these agencies. 16 U.S.C. § 432 (2000). Penalties are imposed for the unlawful excavation, gathering, or destruction of historic or prehistoric monuments or ruins, or objects of antiquity located on lands owned or controlled by the United States. 16 U.S.C. § 433 (2000). While these provisions remain in force, they have largely been superseded by the requirements of the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa–470ll (2000). The Department of the Interior has promulgated regulations that implement the requirements of both of these laws. 43 C.F.R. pt. 7 (2000).

n21 See, e.g., David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 Nat. Resources J. 279, 301–02 (1982); Rasband, *supra* note 10, at 501; Shepherd, *supra* note 10, at 4–11 to 4–13.

n22 See Hal Rothman, *Preserving Different Pasts* 1–33 (1989). Rothman describes the great uncertainty regarding federal ownership of artifacts found on public lands before the passage of the Antiquities Act in the context of the discovery of a stone dish by a private collector in Sequoia National Park. *Id.* at 1–5. Rothman also notes that the Antiquities Act came too late for some cultural resources such as the pictographs and ruins of the San Cristobal pueblo in northern New Mexico, which were subject to a prior land grant. *Id.* at 59–60.

n23 Ronald F. Lee, *The Antiquities Act of 1906*, at <http://www.cr.nps.gov/aad/pubs>, reprinted in Raymond Harris Thompson, *An Old and Reliable Authority*, 42 J. of the S.W. 198 (2000). Lee's manuscript offers an excellent

and comprehensive review of the history behind the passage of the Antiquities Act. It was originally published in 1970. *Id.* Among other things, Lee notes that Richard Wetherill and several of his brothers had "dismantled and shipped complete rooms to the American Museum of Natural History . . ." from the ruins at Chaco Canyon, and that these and other instances "hastened the movement for administrative and legislative action in Washington, D.C." *Id.*

n24 Id.

n25 Id.

n26 H.R. 8066, 56th Cong. (1900).

n27 H.R. 8066, 56th Cong. (1900); see also Lee, supra note 23, at ch. 6 (quoting and referencing Wilson's bill).

n28 Lee, supra note 23, at ch. 6.

n29 H.R. 8195, 56th Cong. (1900).

n30 H.R. 9245, 56th Cong. (1900). Colorado gained admission to the Union in 1876. Act of Mar. 3, 1876, ch. 17, 19 Stat. 5, 6. Utah followed in 1896. J. Res. 8, 29 Stat. 461 (1896). Arizona and New Mexico remained territories until 1912. S.J. Res. 8, 62d Cong., 37 Stat. 39 (1911).

n31 Lee, supra note 23, at ch. 6.

n32 Id.

n33 Id.

n34 Robert Claus, Information About the Background of the Antiquities Act of 1906, at 3 (May 10, 1945) (on deposit with Office of Archeology and Historic Preservation of the National Park Service). The report contains excerpts of the Annual Report of the Commissioner of the General Land Office for 1901, p. 154; for 1902, pp. 115 17; for 1904, pp. 322 23; for 1905, p. 40; for 1906, pp. 47 48.

n35 Lee, supra note 23, at ch. 6.

n36 Id.

*n37 H.R. 11021, 58th Cong. § 1 (1900). The bill further declared that "such reservations shall be known as national parks and shall be under the exclusive control of the Secretary of the Interior, who is hereby empowered to prescribe such rules and regulations and establish such services as he shall deem necessary for the care and management of the same." *Id.* § 2. At the time that Hermann proposed this legislation, only six national parks had been designated, and one (Mackinac) had been abolished. Lee, supra note 23, at ch. 6. By comparison, forty one forest reserves encompassing forty six million acres had been designated. *Id.* At the time Hermann proposed this legislation, these forest reserves were under his jurisdiction. *Id.* In the Forest Transfer Act of 1905, 16 U.S.C. §§ 472, 476, 495, 551, 554, 615(b), however, these reserves were transferred to the Division of Forestry in the Department of Agriculture. Lee, supra note 23, at ch. 6. Gifford Pinchot became the first Chief Forester of the new agency. *Id.**

*n38 Wilson's earlier draft bill would have authorized protection of prehistoric and scientific objects, but the language contained in Hermann's bill was much closer to the language ultimately enacted. *Id.**

n39 See, e.g., Cappaert v. United States, 426 U.S. 128, 130, 132, 141 42 (1976); Cameron v. United States, 252 U.S. 450, 455 (1920).

n40 Lee, supra note 23, at ch. 6.

n41 Claus, *supra* note 34, at 5.

n42 Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103, repealed by 90 Stat. 2792 (1976). Shortly after the Creative Act was passed, President Harrison set aside the Yellowstone Park Forest Reserve. See A Proclamation Rededicating the National Forests of the Yellowstone Park Timber Land Reserve, at http://fs.jorge.com/archives/centennial/1991/proclamation_presidentbush.htm (last visited Mar. 14, 2003). Over the next two years he set aside an additional fourteen reserves encompassing thirteen million acres of public land. Samuel Trask Dana, *Forest and Range Policy: Its Development in the United States* 102 (1956). Grover Cleveland set aside an additional fifteen forest reserves, and William McKinley added another seventeen. Samuel P. Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890-1920*, at 47 (1959). Subsequently, during his first year in office from 1901-1902, President Theodore Roosevelt set aside more than fifteen million acres on thirteen forest reserves. *Id.* Many members of Congress from the Western states were angry about these reservations, and in 1907 they persuaded the Congress to revoke the President's authority to create new forest reserves in six western states. *Id.* Before signing the legislation, President Roosevelt set aside an additional seventy-five million acres of land, thereby increasing total forest reserves to more than 150 million acres in 159 national forests. *Id.*

n43 Hays, *supra* note 42, at 122.

n44 Lee, *supra* note 23, at ch. 6.

n45 *Id.*

n46 *Id.*

n47 *Id.*

n48 *Id.*

n49 Richards was a former governor of Wyoming, but he apparently did not share the federalist views of some of his Western colleagues. In a letter to the Secretary of the Interior written in 1904, Richards promoted the need for "a general enactment, empowering the President to set apart, as national parks, all tracts of public land which . . . it is desirable to protect and utilize in the interest of the public." Letter from W.A. Richards, Commissioner, General Land Office, to Secretary of the Interior (Oct. 5, 1904), quoted in Robert Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906*, 20 W. Hist. Q. 281, 282 (1989).

n50 Hewett's memorandum appears as an Appendix to H.R. Rep. No. 3704, 58th Cong., Appendix (1905). See also Lee, *supra* note 23, at 6.

n51 See Lee, *supra* note 23, at ch. 6.

n52 *Id.* Hewitt's bill uses the phrase as it appears in the Antiquities Act "objects of historic or scientific interest." The bill omitted, however, the language that would have allowed protection of lands for their "scenic beauty" and "natural wonders." *Id.*

n53 *Id.*

n54 *Id.*

n55 H.R. 11016, 59th Cong. (1906).

n56 S. 4698, 59th Cong. (1906); see also Lee, *supra* note 23, at ch. 6 (noting companion bill in Senate). The text of these bills is reproduced in 4 Edmund B. Rogers, *History of Legislation Relating to the National Park System*, Appendix A (1958).

n57 Lee, *supra* note 23, at ch. 6.

n58 See Rothman, *supra* note 22, at 49 (describing Antiquities Act as "a hasty compromise" that "left many issues unresolved").

n59 See *supra* note 10 and accompanying text; see also 40 Cong. Rec. 7,888 (1906): Mr. LACEY: There has been an effort made to have national parks in some of these regions, but this will merely make small reservations where the objects are of sufficient interest to preserve them. . . . Mr. STEPHENS of Texas: How much land will be taken off the market in the Western States by the passage of the bill? Mr. LACEY: Not very much. The bill provides that it shall be the smallest area necessary [sic] for the care and maintenance of the objects to be preserved. Mr. STEPHENS of Texas: Would it be anything like the forest reserve bill, by which seventy or eighty million acres of land in the United States have been tied up? Mr. LACEY: Certainly not. The objective is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos of the Southwest, whilst the other reserves the forests and the water courses. *Id.* In describing the colloquy, Hal Rothman notes that "[t]he situation deceived both Lacey and Stephens." Rothman, *supra* note 22, at 48.

n60 H.R. Rep. No. 59 2224, at 1 (1906) ("The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.").

n61 Lee, *supra* note 23, at ch. 6; Rothman, *supra* note 22, at 47.

n62 Rothman, *supra* note 22, at 47 48.

n63 *Id.* at 47.

n64 Lee, *supra* note 23, at ch. 6.

n65 Anaconda Copper Co. v. Andrews, 14 Envtl. Rep. Cas. (BNA) 1853 (D. Alaska 1980).

n66 S. 5603, 58th Cong. (1904); see also Lee, *supra* note 23, at ch. 6.

n67 Anaconda Copper, 14 Env't Rep. Cas. (BNA) at 1854. The court also found it compelling that presidents have over the years established a pattern of construing the law broadly over the course, its history, and that Congress refused to restrict the President's authority under the Antiquities Act when it enacted the Federal Land Policy and Management Policy Act in 1976 despite having restricted executive power under a host of other laws authorizing the reservation of public lands. *Id.*

n68 *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 n.29 (1978) ("When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning.").

n69 16 U.S.C. § 431 (2000).

n70 In *Cameron v. United States*, 252 U.S. 450 (1920), the Supreme Court had no trouble finding that the more than 800,000 acre Grand Canyon National Monument was "an object of unusual scientific interest." *Id.* at 455 56. It might be argued that virtually all public land has some scientific value and that, therefore, the Antiquities Act constitutes an unlawful delegation of legislative power to the executive branch because it fails to establish a sufficiently "intelligible principle" to guide the exercise of the President's authority. See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (stating "intelligible principle" necessary for lawful delegation of legislative power). Recently, in *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 457, 490 (2001), the Court rejected a claim that the Clean Air Act, which requires the EPA to set ambient air quality standards "requisite to protect the public health," failed to state an "intelligible principle." The Court found that while "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred[,]

even in sweeping regulatory schemes we have never demanded . . . that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.' " Id. at 475; see also Carol Hardy Vincent & Pamela Baldwin, *National Monuments and the Antiquities Act: Recent Designations and Issues*, Cong. Research Serv. Rep. RL30528, at 11 (Jan. 15, 2001), available at http://www.cnsl.org/nle/crsreports/public/pub_15.pdf (last visited Feb. 12, 2003). So too here, the government need not show that the Antiquities Act articulates how much scientific value national monument lands must have in order to survive a nondelegation challenge. See, e.g., *Yakus v. United States*, 321 U.S. 414, 424 (1944); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943). Moreover, the Supreme Court has expressed a preference for construing statutes narrowly to avoid a constitutional question regarding the scope of the statutory delegation. See *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980). This does not mean that the Court will construe a statute unreasonably so as to avoid a constitutional problem, *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 459, 485 (2001), but it does mean that the Court will "ascertain whether a construction of the statute is fairly possible by which [a constitutional] question may be avoided." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465–66 (1989) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Thus, while a court might reasonably construe the Antiquities Act so as to require that objects of "scientific interest" meet some minimum threshold of significance in order to qualify for monument status, the statute itself would not likely be deemed unconstitutional. Indeed, this was the conclusion reached by the United States Court of Appeals for the District of Columbia Circuit in two recent opinions affirming the dismissal of challenges to five monuments proclaimed by President Clinton. *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136–37 (D.C. Cir. 2002).

n71 Act of Mar. 1, 1872, ch. 21–24., 17 Stat. 32 (1872) (codified as amended at 16 U.S.C. § 21 (2000)).

n72 Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (1891), repealed 90 Stat. 2792 (1976).

n73 See 16 U.S.C. § 475 (2000) ("[I]t is not the purpose or intent of these provisions [of the Forest Service Organic Act of 1897] to authorize the inclusion therein [of forest reserves] of lands more reliable for the mineral therein.").

n74 See generally Harold W. Wood, Jr., *Pinchot and Mather: How the Forest Service and the Park Service Got That Way, Not Man Apart* (1976), reprinted in George Cameron Coggins et al., *Federal Public Land and Resources Law* 114–16 (5th ed. 2002); see also Hays, *supra* note 42, at ch. III.

n75 236 U.S. 459, 463, 483 (1915). The implied authority recognized by the Court in *Midwest Oil* was repealed by the Federal Land Policy and Management Act (FLPMA) of 1976, 43 U.S.C. § 1701 (2000). Before its repeal, however, it had been used to set aside numerous reserves, which at the time of *Midwest Oil* included at least forty-four "Bird Reserves." *Midwest Oil*, 236 U.S. at 470. An interesting and unresolved question is whether the *Midwest Oil* repeal is effective for federal lands that are not covered by FLPMA, most notably outercontinental shelf lands.

n76 See Rothman, *supra* note 22, at 52–71 (discussing first monuments created under Antiquities Act).

n77 16 U.S.C. §§ 1–4 (2000).

n78 16 U.S.C. §§ 1131–1136 (2000).

n79 16 U.S.C. §§ 668dd–668ee (2000).

n80 16 U.S.C. §§ 1271–1287 (2000).

n81 The National Wildlife Refuge Administration Act of 1966 appears to recognize a continuing authority on the part of the President and Secretary of the Interior to designate areas to be included in the National Wildlife Refuge System. 16 U.S.C. § 668dd(a)(3)(A) (2000).

n82 Righter, *supra* note 49, at 283; see also Hays, *supra* note 42, at 133–35 (describing views of Theodore Roosevelt, Secretary of Interior James Garfield, and Gifford Pinchot on importance of having experts within

executive branch, rather than politicians in legislative branch, making decisions affecting conservation of public resources).

n83 The appendix contains a list of all of the monuments thus far proclaimed, along with pertinent information about each of them. Seventy million acres is a land mass approximately the size of the entire State of Nevada. See Thomas R. Harris et al., Public Lands in the State of Nevada, available at <http://www.unce.unr.edu/publications/FS01/FS0132.doc> (last visited Feb. 9, 2003). Table I in Harris's article shows that Nevada has 70,264,320 total acres. Id.

n84 See *infra* Appendix.

n85 Like Reagan, President George Herbert Walker Bush proclaimed no national monuments. However, President Clinton more than made up for this lapse during his two terms in office. See *infra* notes 219–36 and accompanying text.

n86 At the time of this writing, President George W. Bush remains in office and may still choose to designate one or more national monuments under the Antiquities Act. And while Bush and his Interior Secretary, Gale Norton, have shown antipathy toward the law, see, e.g., Kirsten Bovee, Monuments Caught in the Crosshairs, *High Country News*, Apr. 23, 2001, at 3, Utah's Republican Governor Mike Leavitt recently asked the Bush Administration to designate a new San Rafael National Monument in Utah. Governor Mike Leavitt, Utah State of the State Address (Jan. 28, 2002), available at <http://www.utah.gov/governor/stateofstate02/> (last visited Feb. 9, 2003). Secretary Norton has indicated that the Governor's proposal will receive "serious consideration." Dan Harrie, Cannon Blasts Monument Plan, *Salt Lake Tribune*, Feb. 12, 2002, at A1.

n87 Roosevelt was elected Vice President when William McKinley was re-elected in 1900. He became President when McKinley was assassinated in September 1901, and was elected President in 1904. Biography of Theodore Roosevelt, available at <http://www.theodore-roosevelt.com/trbio.html> (last visited Feb. 9, 2003).

n88 Rothman, *supra* note 22, at 69–70.

n89 See *Conservation in the Progressive Era*, available at <http://lcweb2.loc.gov/ammem/ndlpedu/features/timeline/progress/conserve/conserve.html> (last visited Feb. 9, 2003).

n90 Id.; see also Roosevelt's Progressive Party Acceptance Speech (Aug. 6, 1912), available at <http://www.theodore-roosevelt.com/trppaccepts.html> (last visited Feb. 9, 2003).

n91 Proclamation No. 658, 34 Stat. 3236 (1908).

n92 Proclamation No. 794, 35 Stat. 2175 (1908). Among the most important of Roosevelt's other seventeen proclamations were the 60,000 acre Petrified Forest National Monument in Arizona, Proclamation No. 697, 34 Stat. 3266 (1906), the 10,000 acre Chaco Canyon National Monument in New Mexico, Proclamation No. 740, 35 Stat. 2119 (1907), and the nearly 640,000 acre Mount Olympus National Monument in the State of Washington, Proclamation No. 809, 35 Stat. 2247 (1909).

n93 See generally *Cameron v. United States*, 252 U.S. 450 (1920).

n94 John Leshy describes the saga of Ralph Cameron's mining claims at the Grand Canyon as "[p]erhaps the single most spectacular abuse of the Mining Law." John D. Leshy, *The Mining Law: A Study in Perpetual Motion* 57 (1987).

n95 Douglas H. Strong, *Ralph H. Cameron and the Grand Canyon: Part I*, 20 *Arizona and the West* 41, 43 (1978). The Cameron brothers' Last Chance Mine apparently yielded a substantial profit. Id. at 44 (noting that Last Chance Mine shipped five hundred tons of ore by 1896).

n96 Id. at 45.

n97 Id. at 46 47.

n98 Cameron first constructed the trail in 1890 and named it the Cameron Trail. Id. at 45. The trail was improved by Peter Berry and others later that same year so that it was capable of handling cattle and horses. Id. at 46. In 1891, Berry filed a certificate under Arizona law that allowed him to charge a toll for access to the road for ten years with the possibility of having the time extended for five additional years. Id. at 46 47. Cameron purchased Berry's interest in the trail and was able to charge tolls in this manner until 1906. Id. at 47.

n99 Id. at 47 48, 50. The 1908 proclamation withdrawing the Grand Canyon National Monument land from mineral mining was made subject to "all prior valid adverse claims." Proclamation No. 794, 35 Stat. 2175, 2176 (1908).

n100 Strong, *supra* note 95, at 49 50.

n101 Garfield was the son of the former President of the United States, James A. Garfield.

n102 Strong, *supra* note 95, at 50.

n103 Id. at 55 64. Cameron had been elected delegate from the Arizona Territory in 1908, a position he held until Arizona became a state in 1912. Id. at 52. In 1914, he ran an unsuccessful campaign for Governor. Id. at 58. It was not until he became a United States Senator in 1920 that he was able to exert sufficient influence to substantially improve his personal interests. Id. at 64. Professor Joseph L. Sax has suggested that "[t]here has probably never been a more scandalous case of a member of Congress using his office to protect private interests." Joseph L. Sax, *Free Enterprise in the Woods*, Nat. Hist., June 1982, at 14, 17. Eventually, however, Cameron's antics came to the attention of the Attorney General, Harlan Fiske Stone, who later became Chief Justice of the Supreme Court, and Stone appointed a special prosecutor who promptly ended Cameron's tenure on the Bright Angel Trail. Id. at 17.

n104 See generally *Cameron v. United States*, 252 U.S. 450 (1920).

n105 Id. at 455.

n106 Id. at 455.

n107 Id. at 455 56.

n108 Id. at 456.

n109 Antiquities Act of 1906, 16 U.S.C. § 431 (2000).

n110 Cameron, 252 U.S. at 455.

n111 The other case is *Cappaert v. United States*, 426 U.S. 128 (1976), discussed below. See *infra* notes 160 63 and accompanying text. In *United States v. California*, 436 U.S. 32 (1978), the Court held that California had jurisdiction over certain submerged lands off the coast of the Channel Islands National Monument. Id. at 37. The scope of the Antiquities Act, however, was not at issue in that case.

n112 Proclamation No. 869, 35 Stat. 2247 (1909).

n113 Act of June 29, 1938, 52 Stat. 1241.

n114 Rothman, *supra* note 22, at 68.

n115 Carsten Lien, *Olympic Battleground* 37 38 (1991).

n116 See Proclamation No. 869, 35 Stat. 2247 (1909): The slopes of Mount Olympus and the adjacent summits of the Olympic Mountains . . . embrace certain objects of unusual scientific interest, including numerous glaciers, and the region which from time immemorial has formed the summer range and breeding grounds of the Olympic elk (*Cervus Roosevelti*), a species peculiar to these mountains and rapidly decreasing in numbers. *Id.*

n117 Righter, *supra* note 49, at 291.

n118 Proclamation No. 877, 36 Stat. 2498 (1909).

n119 Proclamation No. 1435, 40 Stat. 1760 (1918).

n120 Act of Nov. 19, 1919, 16 U.S.C. § 344 (2000).

n121 See *infra* Appendix.

n122 Proclamation No. 1313, 39 Stat. 1752 (1915); see also Proclamation No. 2290, 53 Stat. 2454 (1939).

n123 Proclamation No. 1339, 39 Stat. 1785 (1916).

n124 The Act of Feb. 26, 1919, ch. 45, 40 Stat. 1178 (codified as amended at 16 U.S.C. § 341 (2000)), established the Lafayette National Park. The boundaries were enlarged and the name was changed to Acadia National Park by the Act of Jan. 19, 1929, ch. 77, 45 Stat. 1083 (codified as amended at 16 U.S.C. § 342b (2000)).

n125 Proclamation No. 1664, 43 Stat. 1914 (1923).

n126 Bryce Canyon was originally authorized as the Utah National Park, Act of June 24, 1924, 43 Stat. 593, but in 1928 Congress changed its name to Bryce Canyon National Park, Act of Feb. 25, 1928, ch. 102, 45 Stat. 147 (codified as amended at 16 U.S.C. § 401 (2000)).

n127 Proclamation No. 1694, 43 Stat. 1947 (1924).

n128 Proclamation No. 1733, 43 Stat. 1988 (1925).

n129 Proclamation No. 1713, 43 Stat. 1968 (1924).

n130 Proclamation No. 1875, 46 Stat. 2988 (1929).

n131 Proclamation No. 1994, 47 Stat. 2506 (1932). The boundaries of the Great Sand Dunes were refined by proclamation on several occasions. In 2000, the Great Sand Dunes became a National Park. 16 U.S.C. § 410hhh (Supp. 2002).

n132 Proclamation No. 2028, 47 Stat. 2554 (1933). Hoover originally designated nearly 850,000 acres as the Death Valley National Monument. *Id.* In 1994, Death Valley was made into a national park encompassing more than two million acres. 16 U.S.C. § 410aaa (2000).

n133 Proclamation No. 2032, 47 Stat. 2557 (1933). Hoover designated more than 53,000 acres as the Saguaro National Monument. *Id.* In 1994, Saguaro became a national park encompassing more than 83,000 acres. Pub. L. No. 103-364, 108 Stat. 3467 (codified as amended at 16 U.S.C. 410zz (2000)).

n134 Hoover also proclaimed the Canyon de Chelly National Monument in Arizona, but not under the Antiquities Act. Instead, his action was based upon special legislation enacted by Congress authorizing the President to establish the Canyon de Chelly National Monument within the Navajo Indian reservation. Pub. L. No. 71-667, 47 Stat. 1419 (2000).

n135 16 U.S.C. § 445 (2000).

n136 Proclamation No. 2193, 50 Stat. 1760 (1937). Joshua Tree was made a national park in 1994. See 16 U.S.C. § 410aaa 22 (2000).

n137 Proclamation No. 2054, 48 Stat. 1705 (1933).

n138 Proclamation No. 2246, 50 Stat. 1856 (1937). The original proclamation encompassed about 32,000 acres. Id. In 1971, Capitol Reef was made a national park encompassing nearly 223,000 acres. See 16 U.S.C. § 273 (2000).

n139 Proclamation No. 2281, 3 C.F.R. 139 (1936 1938).

n140 Proclamation No. 2320, 3 C.F.R. 74 (1938 1943). Congress had provided for the establishment of the Badlands National Monument following the acquisition of sufficient lands as well as compliance with other conditions set forth in the legislation. Act of Mar. 4, 1929, Pub. L. No. 70 1021, 45 Stat. 1553.

n141 Proclamation No. 2578, 3 C.F.R. 327 (1938 1943). Roosevelt issued his proclamation after unsuccessful attempts by the Park Service over many years to have Congress expand the Grand Teton National Park. But see A Bill to Abolish the Jackson Hole National Monument: Hearings on H.R. 2241 Before the House Comm. on Public Lands, 78th Cong. 6 10 (1943).

n142 See generally Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945).

n143 Proclamation No. 2578, 57 Stat. 731 (1943). Rockefeller purchased the lands in 1927 at the "earnest recommendation" of Stephen Mather, who was then the Director of the National Park Service, with the expectation of donating the lands to the National Park Service for inclusion in the Grand Teton National Park. A Bill to Abolish the Jackson Hole National Monument: Hearings on H.R. 2241 Before the House Comm. on Public Lands, 78th Cong. 11 (1943) (statement of Newton B. Drury, Director, National Park Service). Fifteen years later, after several attempts to expand the park had failed, Rockefeller sent a letter to Secretary of the Interior Harold Ickes dated November 27, 1942, which stated as follows: I have definitely reached the conclusion, although most reluctantly, that I should make permanent disposition of this property before another year has passed. If the Federal Government is not interested in its acquisition, or if being interested, is still unable to arrange to accept it on the general terms long discussed and with which you are familiar, it will be my thought to make some other disposition of it, or failing that, to sell it in the market to any satisfactory buyers. Id. at 76. It thus appears that Roosevelt's decision to proclaim the Jackson Hole National Monument on March 15, 1943, less than four months after Rockefeller's letter, was driven in substantial part by the federal government's desire not to lose the Rockefeller donation. Indeed, Ickes responded to Rockefeller's letter on December 4, 1942 with a promise to "do everything in my power to bring about the acceptance of your gift as an addition to the national park system." Id. at 80. Despite Rockefeller's seemingly altruistic motives, at least part of the reason for the acrimony caused by the designation of the Jackson Hole National Monument was the way in which the lands were secretly acquired with Rockefeller money. See Candy Moulton, National Monuments? Not in Wyoming, Casper Star Trib., Jan. 1, 2001, at A1.

n144 A Bill to Abolish the Jackson Hole National Monument: Hearings on H.R. 2241 Before the House Comm. on Public Lands, 78th Cong. 3 (1943) (statement of Newton B. Drury, Director, National Park Service). The Antiquities Act authorizes the protection only of lands "owned or controlled by the Government of the United States." 16 U.S.C. § 431 (2000). Thus, while national monument boundaries might enclose private or state lands, those lands are not themselves part of the monument.

n145 A Bill to Abolish the Jackson Hole National Monument: Hearings on H.R. 2241 Before the House Comm. on Public Lands, 78th Cong. 3 (1943) (statement of Newton B. Drury, Director, National Park Service).

n146 A Bill to Abolish the Jackson Hole National Monument: Hearings on H.R. 2241 Before the House Comm. on Public Lands, 78th Cong. 5 (1943) (statement of Frank A. Barrett, Member, House Comm. on the Public Lands).

The anti-federal sentiment of Wyoming's congressional delegation was also apparent at the hearing. According to Congressman Barrett, "The Park Service is just like every other bureau. They are exceedingly avaricious." *Id.* at 52. According to Wyoming Senator Joseph O'Mahoney, the Jackson Hole proclamation was "not only an invasion of the rights of the sovereign State of Wyoming . . . [and] an invasion of the sacred rights of people affected, it is also an invasion of the rights of Congress to legislate in connection with something definitely within the jurisdiction of the Congress alone." *Id.* at 114.

n147 A Bill to Abolish the Jackson Hole National Monument: Hearings on H.R. 2241 Before the House Comm. on Public Lands, 78th Cong. 66 97, 122 29, 130 38 (1943); see also Rothman, *supra* note 22, at 217 20 (describing testimony of several federal government witnesses, including Dr. Harold E. Anthony of American Museum of Natural History, Dr. Leland Horberg, who was geologist from University of Illinois, and biologist Olaus Murie).

n148 58 F. Supp. 890 (D. Wyo. 1945).

n149 *Id.* at 895.

n150 *Id.*

n151 *Id.*

n152 *Id.* at 895 96 (quoting *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1939)). A key part of the federal government's litigation strategy was its decision not to present evidence regarding the size of the monument. Rothman, *supra* note 22, at 220. This proved to be a sound approach when the court concluded that it had only limited review authority. See *supra* note 150 and accompanying text.

n153 See generally A Bill to Abolish the Jackson Hole National Monument: Hearings on H.R. 2241 Before the House Comm. on Public Lands, 78th Cong. (1943).

n154 H.R. 2241, 78th Cong. (1943); 90 Cong. Rec. 9196 (1944).

n155 90 Cong. Rec. 9808 (1944).

n156 S. Rep. No. 81 1938, at 4 (1950).

n157 16 U.S.C. § 406d 1 (2000).

n158 16 U.S.C. § 431a (2000).

n159 At the time of the Jackson Hole National Monument controversy, Hansen was a Teton County Commissioner, actively involved in opposing the monument because of concerns regarding the economic impacts that would result from the designation. Candy Moulton, *National Monuments? Not in Wyoming*, Casper Star Trib., Jan. 1, 2001, at A1. Hansen has admitted, however, that his concerns were not "borne out." *Id.* Former Senator Alan Simpson, who also opposed the monument, went further: All of us agree that Teton County would not look like it does today if they hadn't (established the monument and expanded the park). Instead of open space there would be gas stations, motels and other businesses on Antelope Flats north of Jackson where the view of the Tetons remains largely unobstructed by development. It was great in hindsight. *Id.*; see also Editorial, *Clinton Forest Plan Deserves Fair Hearing*, Casper Star Trib., Oct. 17, 1999, at A8 (noting that "[f]ormer Senator Clifford Hansen at first opposed expansion of the [Grand Teton National Park], but had the integrity to later admit he had been wrong and that the park was good for Jackson Hole").

n160 426 U.S. 128 (1976).

n161 *Id.* at 131 32.

n162 Id. at 141 42.

n163 Id. at 142.

n164 Rothman, *supra* note 22, at 212 14.

n165 Id. at 224 25.

n166 National Park Service, Chesapeake & Ohio Canal National Historic Park, available at <http://www.nps.gov/choh> (last visited Feb. 16, 2003).

n167 Id.

n168 Proclamation No. 3391, 3 C.F.R. 110 (1959 1963). The monument was redesignated as the Chesapeake and Ohio National Historic Park. Act of Jan. 8, 1971, Pub. L. No. 91 664, 84 Stat. 1978. In the early 1950s the National Park Service had approved a plan to build a scenic highway along the canal route, and the plan was endorsed by the Washington Post. Righter, *supra* note 49, at 297. But Justice William O. Douglas argued eloquently for its preservation, and he persuaded reporters from the Post to accompany him on a hike along the full 185 mile length of the canal. *Id.* When the hikers arrived in the District of Columbia they were greeted by thousands of canal supporters, and soon thereafter, the Park Service abandoned the highway proposal. *Id.*

n169 Rothman, *supra* note 22, at 225.

n170 Proclamation No. 3889, 83 Stat. 924 (1969). The monument was part of the Grand Canyon National Park Act of Jan. 3, 1975, Pub. L. No. 93 620, 88 Stat. 2089.

n171 See Roderick Nash, *Wilderness and the American Mind* 228 (1967) (indicating that dams were to be used to generate hydroelectric power to finance construction of massive project that would bring water from Pacific Northwest to Colorado River basin).

n172 *Id.*

n173 See *id.* at 227 34.

n174 *Id.* at 233 34.

n175 Proclamation No. 3889, 83 Stat. 924 (1969). Before Johnson proclaimed the monument, Congress had passed legislation that prohibited construction of dams anywhere in the Grand Canyon. *Id.* at 234. Marble Canyon was added to the Grand Canyon National Park in 1975. See 16 U.S.C. §§ 228a, 228b (2000).

n176 Righter, *supra* note 49, at 298. Among Udall's proposal were a Gates of the Arctic National Monument, comprising 4,119,000 acres in northern Alaska; a Mt. McKinley National Monument, also in Alaska containing 2,202,000 acres adjoining the national park; and a Sonoran Desert National Monument in Arizona, embracing 911,700 acres. *Lee, supra* note 23, at ch. 8.

n177 See *infra* Appendix. Udall had pared his list to seven monuments but even this proved too much for President Johnson who was concerned that "[t]he taking of this land without opportunity for Congressional study would strain the Antiquities Act for beyond its intent." William C. Everhart, *The National Park Service* 179 (1983). Johnson was also concerned about Congressional opposition to the new monuments. *Id.* at 174 79.

n178 Everhart, *supra* note 177. In expectation of Johnson's approval, Udall had signed a press release announcing that the proclamation had been signed. Johnson ordered Udall to retract the story but refused to accept his resignation. *Id.*

n179 Proclamation No. 4319, 3 C.F.R. 397 (1971–1975); Proclamation No. 4359, 3 C.F.R. 461 (1971–1975).

n180 The names and citations to the seventeen monuments are found in the Appendix. See *infra* Appendix. Secretary of the Interior Stewart Udall had recommended to President Johnson that he proclaim about seven million acres of land in Alaska as national monuments, but as a result of congressional opposition, Johnson chose not to act on Udall's recommendations. Everhart, *supra* note 177, at 130.

n181 They included the nearly eleven million acre Wrangell–St. Elias National Monument, the largest national monument ever proclaimed. Proclamation No. 4625, 3 C.F.R. 98 (1979).

n182 The Office of Legal Counsel at the Department of Justice has determined that national monuments may be proclaimed within the territorial seas extending 200 miles from shore. Memorandum from Randolph D. Moss, Assistant Attorney General, U.S. Department of Justice, to John Leshy, Solicitor, Department of Interior, James Dorskind, General Counsel, National Organic and Atmospheric, Administration, and Dinah Bear, General Counsel, Counsel on Environmental Quality 4–9 (Sept. 15, 2000), available at <http://www.atlantisforce.org/doj1.html> (last visited Feb. 16, 2003). At one point during the Clinton Administration, Secretary Babbitt was considering a recommendation for a national monument that would have encompassed as much as one hundred million acres of submerged lands around the northwestern Hawaiian Islands. Clinton Creates Hawaiian Ocean Preserve, Wash. Post, Dec. 5, 2000, at A08. Jurisdictional issues between the Interior and Commerce Departments as well as concerns about restrictions on fishing ultimately led to a compromise under which President Clinton signed an executive order, Exec. Order No. 13,178, 3 C.F.R. 312 (2001), establishing the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve under the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431–1445 (2000).

n183 Act of Dec. 18, 1971, Pub. L. No. 92–203, 85 Stat. 688 (codified at 43 U.S.C. §§ 1601–1629 (2000)).

n184 *Id.*

n185 43 U.S.C. § 1616(d)(2) (2000). Section 17(d)(2) was first proposed as an amendment to the proposed native claims settlement legislation by Senator Alan Bible of Nevada. Everhart, *supra* note 178, at 128.

n186 All unreserved public lands in Alaska were withdrawn during the nine month period. 43 U.S.C. § 1616(d)(1) (2000).

n187 Everhart, *supra* note 178, at 128.

n188 *Id.* at 130.

n189 43 U.S.C. § 1616(d)(2)(D) (2000).

n190 124 Cong. Rec., H4238–39 (daily ed. May 19, 1978).

n191 G. Frank Williss, *The National Park Service and the Alaska National Interest Lands Conservation Act of 1980: Administrative History*, at ch. 4 & n.115 (1985), available at http://www.cr.nps.gov/history/online_books/williss/adhi4f.htm (last visited Feb. 16, 2003).

n192 *Id.* at ch. 4 & nn.127–41.

n193 43 U.S.C. § 1714(e) (2000). On February 12, 1980, the Secretary of the Interior withdrew forty million acres of land for a period of twenty years under the authority of FLPMA to extend the three-year withdrawals that were scheduled to expire in November 1981. 45 Fed. Reg. 9562 (Feb. 12, 1980).

n194 43 U.S.C. § 1714(b) (2000).

n195 Proclamation Nos. 4611–4627, 93 Stat. 1446–1473 (1978).

n196 Everhart, *supra* note 177, at 130 31.

n197 See *supra* notes 210 16 and accompanying text.

n198 16 U.S.C. §§ 3101 3233 (2000).

n199 See, e.g., ANILCA, Pub. L. No. 96 487, 94 Stat. 2371 (codified as amended at 16 U.S.C. § 410hh(1) (10) (2000)).

n200 16 U.S.C. § 3213(a) (2000).

n201 Mary Helen Yarborough, Groups Continue to Press for ANWR Protection, But Hopes Wane, *Inside Energy*, Dec. 25, 2000, at 13.

n202 See H. Josef Hebert, Babbitt Advises Clinton on Refuge, AP Online, Jan. 5, 2001, available at 2001 WL 3649349. Their concerns were well founded, as the Bush Administration has actively supported limited development of ANWR. See Report of the National Energy Policy Development Group, at 5 10 (May 2001), available at <http://www.whitehouse.gov/energy> (last visited Feb. 16, 2003) (recommending "that the President direct the Secretary of the Interior to work with Congress to authorize exploration and, if resources are discovered, development of the 1002 Area of ANWR").

n203 See Patton Boggs LLP, The Impact of ANILCA on the Potential Designation of the Coastal Plain of ANWR as a National Monument (2000) (on file with author).

n204 16 U.S.C. § 3213(a) (2000).

n205 *Id.*

n206 The Antiquities Act authorizes the President "to declare . . . national monuments." 16 U.S.C. § 431 (2000). The President "may," but is not required to, "reserve" the lands in conjunction with the declaration. *Id.*

n207 See 30 U.S.C. § 181 (2000).

n208 16 U.S.C. §§ 3142(i), 3143 (2000).

n209 Despite the fact that he is "passionately opposed to drilling" in ANWR, Secretary Babbitt described the proposal to designate ANWR as a national monument "a meaningless gesture" that "adds no protection that isn't already there." H. Josef Hebert, Babbitt Advises Clinton on Refuge, AP Online, Jan. 5, 2001, available at 2001 WL 3649349.

n210 462 F. Supp. 1155 (D. Alaska 1978).

n211 *Id.* at 1158.

n212 *Id.* at 1159. This result appears to be consistent with the Supreme Court's subsequent decision in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), that the President is not an agency for purposes of the Administrative Procedure Act (APA). The Franklin Court held that "[o]ut of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence [within the APA] is not enough to subject the President to the provisions of the APA." *Id.* at 800 01.

n213 Carter, 462 F. Supp. at 1160.

n214 *Id.* At oral argument, the State conceded that the President was not subject to NEPA but nonetheless claimed that the Secretary of the Interior had to prepare an impact statement before forwarding his or her

recommendation to the President. Id. The court disagreed, stating, "The argument that the President cannot ask for advice, and must personally draw lines on maps, file the necessary papers, and the other details that are necessary to the issuance of a Presidential Proclamation in order to escape the procedural requirements of NEPA approaches the absurd." Id. The Clinton Administration relied substantially on *Alaska v. Carter* to avoid NEPA compliance for the recommendations made ostensibly at the President's request by Secretary Babbitt. See H.R. 1487, The National Monument NEPA Compliance Act: Hearing Before the Subcomm. on Nat'l Parks & Public Lands of the House Comm. on Resources, 106th Cong. 7 9 (1999) (statement of Rep. Hansen, Member, House Comm. on Resources).

n215 *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. (BNA) 1853, 1853 54 (D. Alaska July 1, 1980).

n216 Id. at 1854 55.

n217 Statistical information and election results for congressional elections is available at http://clerkweb.house.gov/members/election_info/elections.php.

n218 Jon Margolis, In Washington, The Emperor Is on Babbitt's Side, *High Country News*, Nov. 22, 1999, available at http://www.hcn.org/servlets/hcn.Article?article_id=5390 (last visited Feb. 16, 2003).

n219 The historic monuments include the following: (1) President Lincoln and Soldiers' Home National Monument, the two acre site of the Anderson Cottage (also known as Soldiers' Home), where President Lincoln and his family lived during Washington's warm summer months, Proclamation No. 7329, 3 C.F.R. 123 (2001); (2) Minidoka Internment National Monument, a 72.75 acre tract of land in Idaho that was the site of a Japanese internment camp during World War II, Proclamation No. 7395, 3 C.F.R. 15 (2002); (3) Pompeys Pillar National Monument, a 51 acre tract of land in Montana that includes a bluff with William Clark's name carved in the wall, which is the only known tangible evidence of the Lewis and Clark expedition, Proclamation No. 7396, 3 C.F.R. 19 (2002); and (4) Governors Island National Monument, a 20 acre site in New York State that served as an outpost for New York City during the early part of the 19th century, Proclamation No. 7402, 3 C.F.R. 39 (2002).

n220 These monuments include (1) the 12,708 acre Virgin Islands Coral Reef National Monument, which is directly adjacent to the Virgin Islands National Park off the island of St. John, Proclamation No. 7399, 3 C.F.R. 32 (2002), and (2) the 18,135 acre expansion of the Buck Island Reef National Monument off the island of St. Croix, Proclamation No. 7392, 3 C.F.R. 3 (2002).

n221 Proclamation No. 7264, 3 C.F.R. 5 (2001).

n222 Fifteen BLM managed national monuments are noted on BLM's website. Bureau of Land Management, National Landscape Conservation System, available at <http://www.blm.gov/nles/brochure> (last visited Feb. 17, 2003). One of these, the Santa Rosa and San Jacinto Mountains National Monument, was designated by Congress. Id.

n223 Proclamation No. 7295, 3 C.F.R. 60 (2001). As a result of two legal opinions issued in the wake of the Alaska monuments proclaimed by President Carter in 1978, the National Park Service is required to retain some management responsibility for this monument. See *infra* notes 329 30 and accompanying text.

n224 Proclamation No. 7319, 3 C.F.R. 102 (2001).

n225 These include the following seven new monuments: Grand Staircase Escalante, Proclamation No. 6920, 3 C.F.R. 64 (1996); Grand Canyon Parashant, Proclamation No. 7265, 3 C.F.R. 7 (2001); Giant Sequoia, Proclamation No. 7295, 65 Fed. Reg. 24,095 (Apr. 15, 2000); President Lincoln and Soldiers Home, Proclamation No. 7329, 65 Fed. Reg. 43,673 (July 7, 2000); Minidoka Internment, Proclamation No. 7395, 66 Fed. Reg. 7,347 (Jan. 17, 2001); Virgin Islands Coral Reef, Proclamation No. 7399, 66 Fed. Reg. 7,364 (Jan. 17, 2001); Governors Island, Proclamation No. 7266, 65 Fed. Reg. 2,831 (Jan. 11, 2000); Craters of the Moon, Proclamation No. 7373, 65 Fed. Reg. 69,221 (Nov. 9, 2000); and Buck Island Reef, Proclamation No. 7392, 3 C.F.R. 60 (2001).

n226 Proclamation No. 6920, 3 C.F.R. 64 (1997).

n227 Id.

n228 Proclamation No. 7265, 3 C.F.R. 7 (2001).

n229 Proclamation No. 7374, 3 C.F.R. 199 (2001).

n230 See, e.g., Grand Canyon Wildlands Counsel, Inc., An Inventory, Assessment, and Development of Recovery Priorities for Arizona Strip Springs, Seeps, and National Ponds (Mar. 3, 2001), available at <http://www.grandcanyonwildlands.org/springsynthesis.pdf> (last visited Feb. 17, 2003).

n231 Proclamation No. 7263, 3 C.F.R. 1 (2001).

n232 Proclamation No. 7317, 3 C.F.R. 93 (2001).

n233 Proclamation No. 7320, 3 C.F.R. 107 (2001).

n234 Proclamation No. 7397, 3 C.F.R. 22 (2002).

n235 Proclamation No. 7318, 65 Fed. Reg. 37,249 (June 9, 2000). This proclamation describes the area as a "biological crossroads the interface of the Cascade, Klamath, and Siskiyou ecoregions, in an area of unique geology, biology, climate and topography." Id.

n236 Proclamation No. 7398, 66 Fed. Reg. 7,359 (Jan. 17, 2001).

n237 Interior Secretary Babbitt's policy was to give local politicians the opportunity to advance legislation that would assure the protection of areas before he recommended a monument proclamation to the President. See infra notes 409–10 and accompanying text.

n238 For example, the Secretary refused to support legislation that would have established the Shivwits Plateau National Conservation Area because it did "not establish a management standard adequate for long term protection of the unique resources of this area." Shivwitz Plateau National Conservation Area Establishment Act: Hearing on H.R. 2795 Before the House Res. Subcomm. on Nat'l Parks & Public Lands of the House Comm. on Res., 106th Cong. (1999) (statement of Bruce Babbitt, Secretary of the Interior), available at 1999 WL 969928. This area was subsequently protected as part of the Grand Canyon Parashant National Monument. Proclamation No. 7265, 65 Fed. Reg. 2,825 (Jan. 11, 2000).

n239 Steens Mountain Cooperative Management and Protection Act, Pub. L. No. 106-399, 114 Stat. 1655 (2000).

n240 Colorado Canyons National Conservation Area and Black Ridge Canyons Wilderness Act, Pub. L. No. 106-353, 114 Stat. 1374 (2000).

n241 Santa Rosa and San Jacinto Mountains National Monument Act, Pub. L. No. 106-351, 114 Stat. 1362 (2000).

n242 Consolidated Appropriation Act of 2001, Pub. L. No. 106-554, App. D-1, 114 Stat. 2763.

n243 Pub. L. No. 106-538, 114 Stat. 2563 (2000).

n244 See 16 U.S.C. § 431 (2000); 16 U.S.C. § 460mmm 4(a)(2)(A) (2000); 16 U.S.C. § 460nnn 21(a) (2000); 16 U.S.C. § 460ooo 2(a) (2000) 16 U.S.C. § 460ppp 3(a) (2000).

n245 See Exec. Order 13,178, § 8(a), 65 Fed. Reg. 76,903, 76,908 (Dec. 4, 2000) (establishing preliminarily Reserve but also providing that Reserve would be made permanent only after opportunity for public comment).

n246 Exec. Order No. 13,196, 66 Fed. Reg. 7395 (Jan. 18, 2001).

n247 See Carol Hardy Vincent & Pamela Baldwin, National Monuments and the Antiquities Act: Recent Designations and Issues, Cong. Res. Serv. Rep. No. RL30528, Jan. 15, 2001, at 11–12, available at http://www.cnsl.org/nle/crsreproto/public/pub_15.pdf (last visited Feb. 12, 2003).

n248 See, e.g., Utah Ass'n of Counties v. Clinton, No. 2:97 CV 0479, 1999 U.S. Dist. LEXIS 15852 (D. Utah Aug. 11, 1999).

n249 Id.; see also Engineering & Mining Journal, North American Roundup (Oct. 1, 1999), available at http://ejmj.com/ar/mining/north_american_roundup_4 (last visited Feb. 17, 2003).

n250 Esplin v. Clinton, CIV 00-0248 PCT PGR (D. Az filed Jan. 25, 2000), available at http://www.citizensalliance.org/links/pages/legal%20issues/lanas_injunction.htm (last visited Mar. 14, 2003).

n251 Mountain States Legal Found. v. Bush, 306 F.3d 1132 (D.C. Cir. 2002).

n252 Tulare County v. Bush, 306 F.3d 1138 (D.C. Cir. 2002); see also supra notes 17, 70 and accompanying text.

n253 Tulare County, 306 F.3d at 1141; Mountain States, 306 F.3d at 1137–38.

n254 Proclamation No. 7397, 3 C.F.R. 22 (2001).

n255 Id.

n256 See, e.g., Reed F. Noss & Allen Y. Cooperrider, Saving Nature's Legacy 87, 89 (1994). Among other things, the authors describe the emerging science of conservation biology, stating, "The fundamental belief of conservation biology is that biodiversity is good and should be conserved. The mission of conservation biology, then, is to conserve as much of global diversity as possible and to allow evolution to continue generating biodiversity." Id. at 85–86. In order to conserve biodiversity, the authors promote the protection of ecosystems, as well as ecological processes for "[m]anag[ing] landscapes and communities . . . to maintain the evolutionary potential of the biota." Id. at 89.

n257 252 U.S. 450 (1920).

n258 426 U.S. 128 (1976).

n259 58 F. Supp. 390 (D. Wyo. 1945).

n260 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980).

n261 306 F.3d 1138 (D.C. Cir. 2002).

n262 306 F.3d 1132 (D.C. Cir. 2002).

n263 Alternatively, plaintiffs may argue that, if the Antiquities Act allows such designations, they constitute an unconstitutional delegation of authority to the President. As noted previously, however, the courts rarely strike down legislation on this ground. See supra note 70 and accompanying text. Moreover, even if the standards established under the Antiquities Act are fairly general, they are likely to be sufficient to satisfy a reviewing court. See supra note 70 and accompanying text.

n264 See generally, e.g., *Cameron v. United States*, 252 U.S. 450 (1920); *Tulare County*, 306 F.3d at 1141-42; *Wyoming v. Franke*, 53 F. Supp. 890, 897-98 (D. Wyo. 1945).

n265 As described more fully below, President Clinton's recent monument designations include a substantial record and bibliography of authorities that support the designations. See *infra* note 426 and accompanying text. Accordingly, unless the record distorts the facts, it may be difficult to overturn these designations under current case law. See generally *Cameron v. United States*, 252 U.S. 450 (1920). Given this fact, it might make strategic sense for plaintiffs to focus on particular portions of a monument that they believe do not meet the criteria established in the proclamation and the supporting literature. It will likely be difficult and perhaps impractical or even impossible, to identify such tracts and to demonstrate with certainty that the tracts are not part of the landscape or ecosystem that was intended for protection. Moreover, the federal government will likely follow the strategy that was used to defend the Jackson Hole National Monument, which was to avoid focusing on particular portions of the monument, but rather to treat the monument and its resources as a single, unified entity. See *Franke v. United States*, 58 F. Supp. 890, 895-96 (D. Wyo. 1945).

n266 16 U.S.C. § 431 (2000).

n267 President Carter's Alaska proclamations generally were more detailed than those of his predecessors in describing the objects to be protected, and in articulating restrictions on use. See, e.g., Proclamation No. 4625, 93 Stat. 1473 (1978); Proclamation No. 4626, 98 Stat. 1472 (1978); Proclamation No. 4627, 93 Stat. 1473 (1978). The Clinton era proclamations continued this trend. See, e.g., Proclamation No. 6920, 3 C.F.R. 64 (2000); Proclamation No. 7295, 65 Fed. Reg. 24095 (Apr. 15, 2000). Most proclamations generally preclude, either explicitly or implicitly, most forms of physical appropriation of the land. See, e.g., Proclamation No. 658, 34 Stat. 3236, 5237 (1906) ("Warning is hereby expressly given to all unauthorized persons not to appropriate, injure, or destroy . . . or to locate or settle on any of the lands reserved"). The Clinton monuments, however, address issues such as grazing, off road vehicle use, and hunting and fishing, that were often ignored in earlier proclamations. See, e.g., Proclamation No. 7397, 3 C.F.R. 22 (2001); Proclamation No. 7319, 65 Fed. 3d Reg. 37253 (June 9, 2000). Some of the Clinton era proclamations allow uses such as grazing to continue, subject to the overriding goal of protecting the objects identified in the proclamation. See, e.g., Proclamation No. 7393, 3 C.F.R. 32 (2001) (allowing pre-monument grazing policies to "continue to apply"). Others restrict such uses. See, e.g., Proclamation No. 7394, 3 C.F.R. 7 (2001) (requiring Interior Secretary to retire grazing allotments within monument "unless the Secretary specifically finds that livestock grazing will advance the purposes of the proclamation"); Proclamation No. 7397, 3 C.F.R. 22 (2001) (providing that grazing permits south of Interstate 8 "shall not be renewed at the end of their current term"); Proclamation No. 7399, 3 C.F.R. 32 (2001) (prohibiting anchoring and "all extractive uses" including fishing, subject to limited exceptions).

n268 Even the earliest proclamations include this language except for the word "remove" in the first clause. See, e.g., Proclamation No. 658, 34 Stat. 3236 (1906); Proclamation No. 2226, 34 Stat. 3265 (1937). The most recent proclamations employ this language verbatim. See, e.g., Proclamation No. 7397, 3 C.F.R. 22 (2001); Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 17, 2001).

n269 See, e.g., Proclamation No. 7320, 65 Fed. Reg. 37259 (June 9, 2000) ("[T]he national monument shall be the dominant reservation.").

n270 Proclamation No. 1191, 37 Stat. 1737 (1912).

n271 *Id.*

n272 *Id.*

n273 See Lien, *supra* note 115, at 39 (noting that Interior Secretary Ballinger, and his successor Walter Fisher, had construed Antiquities Act to preclude mining and logging in national monuments).

n274 See 16 U.S.C. § 1 (2000): The [National Park] service thus established shall promote and regulate the

use of the Federal areas known as national parks, monuments, and reservations hereinafter specified . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. *Id.*

n275 Management of units of the National Wildlife Refuge System are governed by the National Wildlife Refuge Administration Act of 1966, 16 U.S.C. §§ 668dd-668ee (2000). Among other things, that law makes it illegal to "disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the System; or take or possess any fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof within such area" unless permitted in accordance with regulations promulgated by the Secretary. *Id.* § 668dd(c).

n276 Unlike special purpose agencies, the Forest Service and the BLM both follow a multiple use/sustained yield mandate. 16 U.S.C. § 529 (2000); 43 U.S.C. § 1732 (2000).

n277 Typically, national monument proclamations are made subject to valid existing rights, thereby protecting the rights of persons who have valid leases at the time of the proclamation. See, e.g., Proclamation No. 7397, 3 C.F.R. 22 (2001) ("The establishment of this monument is subject to valid existing rights.").

n278 30 U.S.C. § 181 (2000) ("Deposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite . . . or gas, and lands containing such deposits, but excluding lands . . . in national parks and monuments . . . shall be subject to disposition [under the Mineral Leasing Act.]") (emphasis added); see also National Monuments, 60 Interior Dec. 9, 10, No. M 34978, 1947 WL 5112 (Dep't of the Interior, July 21, 1947). In the Canyons of the Ancients National Monument in Colorado, Proclamation No. 7317, 3 C.F.R. 93 (2000), President Clinton provided that: Because most of the Federal lands have already been leased for oil and gas, which includes carbon dioxide, and development is already occurring, the monument shall remain open to oil and gas leasing and development; provided, the Secretary of the Interior shall manage the development, subject to valid existing rights, so as not to create any new impacts that interfere with the proper care and management of the objects protected by this proclamation; and provided further, the Secretary may issue new leases only for the purpose of promoting conservation of oil and gas resources in any common reservoir now being produced under existing leases, or to protect against drainage. *Id.* Arguably, this leasing provision in the Canyons of the Ancients Proclamation conflicts with the Mineral Leasing Act. The Attorney General has determined that "where oil is being drained from Government owned land that is not subject to the Mineral Leasing Act, there is implied authority in the head of the department having jurisdiction over such land to take protective measures to offset the drainage, including the making of the necessary contracts." National Monuments, 60 Interior Dec. at 10 (interpreting meaning of 40 Op. Att'y Gen. 41 (1941)). Solicitor White construed this language to allow oil and gas leasing in the Jackson Hole National Monument where federal resources were at risk of being lost, notwithstanding the plain language of the Mineral Leasing Act. *Id.* While the Canyons of the Ancients Proclamation allows new leases more broadly than were authorized by the Solicitor's opinion, the narrow leasing authority contained in the Canyons of the Ancients Proclamation is arguably consistent with the intent of that opinion, which was to avoid the waste of federal resources.

n279 See, e.g., Proclamation No. 7320, 65 Fed. Reg. 37259 (June 9, 2000) ("The Secretary of the Interior shall manage the monument . . . to implement the purposes of this proclamation.").

n280 *Id.*

n281 See, e.g., Proclamation No. 7397, 3 C.F.R. 22 (2001) (prohibiting "all motorized and mechanized vehicle use off road," and, subject to valid existing rights, withdrawing land from "all forms of entry, location, selection, sale, or leasing, or other disposition under the public lands laws"). This proclamation also provides that grazing leases south of Interstate 8, which runs through the center of the monument, "shall not be renewed at the end of their current term." *Id.*

n282 *Id.*

n283 All of the federal land management agencies prepare land use plans to govern the management of particular tracts of land. See, e.g., 43 U.S.C. § 1712 (2000) (governing land use planning on BLM lands). Separate plans are likely to be developed for each monument, and these plans will identify compatible and incompatible uses throughout the monument. See, e.g., Bureau of Land Management, Cascade Siskiyou National Monument, Draft Resource Management Plan/Environmental Impact Statement (May 2002), available at <http://www.blm.gov/csm/Docs/Volume%201%20Introduction.pdf> (last visited Feb. 19, 2003).

n284 16 U.S.C. § 431 (2000).

n285 Id.

n286 Id.

n287 A nation is sovereign in its territorial sea. 12 Op. Off. Legal Counsel 238, 240 (1988). Under a 1988 presidential proclamation, President Reagan extended the territorial seas of the United States to twelve nautical miles seaward. Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988). The Submerged Lands Act of 1953, 43 U.S.C. §§ 1301–1315 (2000), however, generally granted to the states all "right, title, and interest" over submerged lands from the high water mark to three miles seaward. Id. § 1311. Nonetheless, the Attorney General has taken the position that the President may proclaim a national monument over submerged lands under the primary jurisdiction of the states in accordance with the Submerged Lands Act. Memorandum from Randolph D. Moss, Assistant Attorney General, U.S. Department of Justice, to John Leshy, Solicitor, Department of Interior, James Dorskind, General Counsel, National Organic and Atmospheric, Administration, and Dinah Bear, General Counsel, Counsel on Environmental Quality 4–9 (Sept. 15, 2000), available at <http://www.atlantisforce.org/doj1.html> (last visited Feb. 16, 2003). According to the Assistant Attorney General, this is because the United States retains some measure of "control" over lands within the zero to three mile range under § 6(a) of the Submerged Lands Act. Id. It provides that the United States retains "its rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs." 43 U.S.C. § 1314(a) (2000); see also Memorandum from Randolph D. Moss, Assistant Attorney General, U.S. Department of Justice, to John Leshy, Solicitor, Department of Interior, James Dorskind, General Counsel, National Organic and Atmospheric, Administration, and Dinah Bear, General Counsel, Counsel on Environmental Quality 4–9 (Sept. 15, 2000), available at <http://www.atlantisforce.org/doj1.html> (last visited Feb. 16, 2003). In *United States v. California*, 436 U.S. 32 (1978), the Supreme Court concludes that the submerged lands within the Channel Islands National Monument, which extended one mile from the shore, were conveyed to the State of California in the Submerged Lands Act of 1953. Id. at 41. But the Court does not explicitly find that these lands are no longer part of the monument. On the contrary, at the end of its opinion, the Court notes that the Submerged Lands Act "provides for the retention by the United States of its navigational servitude and its 'rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs.'" Id. at 41 n.8 (quoting 43 U.S.C. § 1314(a) (2000)) (emphasis added). Under the Antiquities Act, the retention of some "control" over the lands is all that is required to allow designation of a national monument. 16 U.S.C. § 431 (2000).

n288 Proclamation No. 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983).

n289 Exec. Order No. 13,196, 66 Fed. Reg. 7,395 (Jan. 18, 2001).

n290 Memorandum from Randolph D. Moss, Assistant Attorney General, U.S. Department of Justice, to John Leshy, Solicitor, Department of Interior, James Dorskind, General Counsel, National Organic and Atmospheric, Administration, and Dinah Bear, General Counsel, Counsel on Environmental Quality 11–17 (Sept. 15, 2000), available at <http://www.atlantisforce.org/doj1.html> (last visited Feb. 16, 2003). Management of any such monument must, however, be consistent with "recognized rules of international law." Id. at 16.

n291 See *infra* notes 433–36 and accompanying text.

n292 See 16 U.S.C. § 431 (2000).

n293 Rothman, *supra* note 22, at 49.

n294 *Id.*

n295 See Lee, *supra* note 23, at ch. 8. In 1915, the War Department issued Bulletin No. 27, which purported to establish fifty additional national monuments on military lands, including the Statue of Liberty (which was adjacent to Fort Wood). Rothman, *supra* note 22, at 191. Though the bulletin remained in effect for ten years, these "monuments" were not lawful because the Antiquities Act authorizes only the President to declare national monuments. *Id.* Bulletin No. 27 was finally rescinded on March 20, 1925 by War Department Bulletin No. 2. Lee, *supra* note 23, at ch. 8 n.160. Five of these monuments were ultimately ratified by President Coolidge, however, including the Statue of Liberty. Proclamation No. 1713, 43 Stat. 1968 (1924); Lee, *supra* note 23, at ch. 8; Rothman, *supra* note 22, at 191.

n296 Rothman, *supra* note 22, at 192–93. On November 16, 1925, the War Department appointed William A. Simpson as the first superintendent of the Statue of Liberty National Monument. *Id.* at 193. His responsibilities were essentially custodial, and they did not even include explaining the historical importance of the monument to the general public. *Id.*

n297 Harold K. Steen, *The U.S. Forest Service: A History* 153–59 (1976).

n298 16 U.S.C. § 1 (2000); see also Wood, *supra* note 74, at 116 (arguing that rivalry between Park Service and Forest Service had salutary effect of pushing Forest Service toward its own program to protect aesthetic resources and preserve wilderness areas).

n299 Perhaps the most famous forest reserve converted to a national park is the Grand Canyon. President Benjamin Harrison created the Grand Canyon Forest Reserve in 1893, and withdrew the land from homestead entry, notwithstanding the fact that the area had few trees. Proclamation No. 45, 27 Stat. 1064 (1893). Theodore Roosevelt subsequently declared the land a national monument but provided that the Forest Service would continue to manage the lands. Proclamation No. 794, 35 Stat. 2175 (1908). In 1919 the Grand Canyon became a national park and was placed under the jurisdiction of the National Park Service. Act of Feb. 26, 1919, 40 Stat. 1175 (codified as amended at 16 U.S.C. §§ 221–222 (2000)).

n300 Rothman, *supra* note 22, at 140–45. The Bandelier National Monument in New Mexico offers one of the better examples of the conflicts between the two agencies. Originally under the jurisdiction of the Forest Service, the Park Service was unhappy with the way in which the Forest Service managed the cultural resources of the monument. *Id.* In 1924, Stephen Mather, the Director of the National Park Service, proposed creation of a 200,000 acre Cliff Cities National Park that would include Bandelier and much more national forest land. *Id.* Eventually, the Forest Service reluctantly agreed to transfer jurisdiction over a slightly enlarged 26,000 acre monument to the National Park Service. Proclamation No. 1991, 47 Stat. 2503 (1932); Rothman, *supra* note 22, at 145–59.

n301 Rothman, *supra* note 22, at 119–39.

n302 Act of Aug. 25, 1916, ch. 408, 39 Stat. 535.

n303 H.R. 15522, 64th Cong. (1916), reprinted in H.R. Rep. No. 64–700, at 1 (1916).

n304 16 U.S.C. § 2 (2000). This section also provides that for monuments "contiguous to national forests the Secretary of Agriculture may cooperate with [the] National Park Service to such extent as may be requested by the Secretary of the Interior." *Id.*

n305 16 U.S.C. § 3 (2000). As noted previously, the statute also requires management of all monuments for conservation purposes and "by such means as will leave them unimpaired for the enjoyment of future generations." *Id.* § 1.

n306 Examples include Lehman Caves National Monument, Proclamation No. 1618, 42 Stat. 2260 (1922); Timpanogos Cave National Monument, Proclamation No. 1640, 42 Stat. 2285 (1922); and Lava Beds National Monument, Proclamation No. 1755, 44 Stat. 2591 (1925).

n307 36 Op. Att'y Gen. 75 (1929).

n308 Id. at 77.

n309 Id. (stating that §§ 1, 3, and 4 of the Antiquities Act support this conclusion).

n310 U.S. Const. art. IV, § 3, cl. 2.

n311 The opinion, 36 Op. Att'y Gen. 75, 79 (1929), also cites an earlier Attorney General Opinion, 28 Op. Att'y Gen. 143, 144 (1910), holding that absent authority from Congress, lands reserved for military purposes cannot be transferred to another department. A 1923 Attorney General Opinion appears to limit the scope of the Camp Hancock opinion and suggests that it does not apply where the President is exercising "broad discretionary powers" to reserve land (e.g., under the implied authority of *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915)). 33 Op. Att'y Gen. 436, 437 (1923). But since the Antiquities Act, 16 U.S.C. § 431 (2000), contains express reservation authority, this Attorney General Opinion does not seem applicable to national monument proclamations.

n312 Proclamation No. 1875, 46 Stat. 2988 (1929).

n313 Proclamation No. 1991, 47 Stat. 2503 (1932). Bandelier was originally established under Proclamation No. 1322, 39 Stat. 1764 (1916). It was enlarged and transferred to the National Park Service in the 1932 proclamation. Proclamation No. 1991, 47 Stat. 2503 (1932).

n314 Act of Mar. 3, 1933, ch. 212, 47 Stat. 1489, 1517.

n315 Renamed the National Park Service by the Act of Mar. 2, 1934, 48 Stat. 362, 389.

n316 The functions of the Bureau of Insular Affairs were transferred to the Division of Territories and Island Possessions in the Department of the Interior by Reorganization Plan No. 2 of 1939. 4 Fed. Reg. 2731 (May 9, 1939).

n317 Exec. Order No. 6,166, § 2 (June 10, 1933), available at http://www.archives.gov/federal_register/codification/executive_order/06166.html (last visited Feb. 24, 2003). Section 22 of Executive Order No. 6,166 provides that "this order shall become effective 61 days from its date." Id. On July 28, 1933, President Franklin Roosevelt issued Executive Order No. 6,228, which modified Executive Order No. 6,166 before it took effect in several respects. For example, the newer order contains a specific list of all War Department cemeteries and parks transferred to the Interior Department under Executive Order No. 6,166, but provides that the transfer of national cemeteries not listed was postponed "until further order." Id. Furthermore, it revokes the provision that provides for the transfer of national cemeteries located in foreign countries to the Department of State. Id.

n318 See Transfer of National Monuments Located in National Forests, 54 Interior Dec. 314, 315, 1933 WL 1976 (Dep't of the Interior Oct. 24, 1933).

n319 Id.

n320 Id.

n321 Id. at 316.

n322 Id.

n323 Id.

n324 Id.

n325 54 Interior Dec. at 316.

n326 Exec. Order No. 6,166 (June 10, 1933), available at http://www.archives.gov/federal_register/codification/executive_order/06166.html (last visited Feb. 24, 2003).

n327 See, e.g., Proclamation No. 3889, 83 Stat. 924 (1969) (establishing Marble Canyon National Monument and revising boundaries of Kaibab National Forest to eliminate national monument lands). The proclamation itself is unclear as to whether the National Park Service is supposed to manage these lands, but that appears to have been the intent since the proclamation cites with approval an Advisory Board endorsement to include Marble Canyon in the National Park System. See *id.*

n328 See Proclamation No. 4611, 3 C.F.R. 69 (1979); Proclamation No. 4623, 3 C.F.R. 93 (1979). See also Proclamation No. 4612, 3 C.F.R. 72 (1979); Proclamation No. 4613, 3 C.F.R. 74 (1979); Proclamation No. 4614, 3 C.F.R. 76 (1979); Proclamation No. 4615, 3 C.F.R. 78 (1979); Proclamation No. 4616, 3 C.F.R. 80 (1979); Proclamation No. 4617, 3 C.F.R. 82 (1979); Proclamation No. 4618, 3 C.F.R. 84 (1979); Proclamation No. 4619, 3 C.F.R. 86 (1979); Proclamation No. 4620, 3 C.F.R. 88 (1979); Proclamation No. 4621, 3 C.F.R. 89 (1979); Proclamation No. 4622, 3 C.F.R. 91 (1979); Proclamation No. 4624, 3 C.F.R. 96 (1979); Proclamation No. 4625, 3 C.F.R. 98 (1979); Proclamation No. 4626, 3 C.F.R. 100 (1979); Proclamation No. 4627, 3 C.F.R. 102 (1979). The 56 million acres included Aniakchak, Becharof, Bering Land Bridge, Cape Krusenstern, Denali, Gates of the Arctic, Glacier Bay, Katmai, Kenai Fjords, Kobuk Valley, Lake Clark, Noatak, Wrangell St. Elias, Yukon Charley, Yukon Flats, Admiralty Island (Agriculture), and Misty Fjords (Agriculture) National Monuments. These monuments were subsequently modified by the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101–3233 (2000). Most of the monument lands were converted to other conservation system units. See 16 U.S.C. § 3102(4) (2000) (defining conservation system unit); see also 16 U.S.C. § 410nn (2000).

n329 See generally 4B Op. Off. Legal Counsel 396 (1980); 3 Op. Off. Legal Counsel 85 (1979). The conduct of litigation on behalf of the United States generally is reserved to the Department of Justice and the Attorney General. 28 U.S.C. §§ 516, 519 (2000). Likewise, all legal advice provided by the Office of Legal Counsel, under delegation from the Attorney General, generally is binding on executive branch agencies. See *Pub. Citizen v. Burke*, 843 F.2d 1473, 1477 (D.C. Cir. 1988) (quoting Archivist's testimony before Congress that opinion is binding on National Archives); *Tenaska Washington Partners II, L.P. v. United States*, 34 Fed. Cl. 434 (1995) (stating that "OLC [opinion] is binding on the Department of Justice and the executive branch agencies"); see also 28 U.S.C. § 512 (2002) (stating that Attorney General is to advise heads of executive departments); 28 C.F.R. § 0.25 (2000) (describing general function of Office of Legal Counsel).

n330 3 Op. Off. Legal Counsel 85, 85 (1979).

n331 *Id.* at 90.

n332 37 Op. Att'y Gen. 418 (1934).

n333 *Id.* at 418–19.

n334 *Id.* at 419 (emphasis added).

n335 Act of March 3, 1933, ch. 212, § 407, 47 Stat. 1519.

n336 37 Op. Att'y Gen. 418 (1934).

n337 *Id.* This point finds support in a 1996 memorandum prepared by the American Law Division of the

Congressional Research Service, which stated, "The 1979 Legal Opinion stated that the 1933 Order had required 'the assent of Congress,' but this is not the case." Memorandum by Pamela Baldwin, American Law Division of the Congressional Research Service 14 (Dec. 13, 1996) (on file with the American Law Division).

n338 See generally Baldwin, *supra* note 337.

n339 3 Op. Off. Legal Counsel 85, 86 (1979) (quoting Exec. Order No. 6,166 (1933)).

n340 *Id.* at 85. The 1979 opinion also addressed the Forest Service's argument that the National Forest Management Act (NFMA) requires congressional approval before forest lands are removed from Forest Service jurisdiction. *Id.* at 87-89. The relevant provision of NFMA states that "no land now or hereafter reserved or withdrawn from the public domain as national forests . . . shall be returned to the public domain except by an act of Congress." 16 U.S.C. § 1609(a) (2000). A Senate Report describing this language suggested that it "in effect, gives Congressional status to National Forest lands." S. Rep. No. 94-893, at 19 (1976). The Office of Legal Counsel opinion, however, describes this language as "at best, inconclusive" and found that the relevant language from NFMA merely precludes restoration of the land to the public domain. 3 Op. Off. Legal Counsel 85, 88-89 (1979).

n341 4B Op. Off. Legal Counsel 396, 396-99 (1980).

n342 See *id.* at 399: The USDA and Interior representatives agreed that the Forest Service and the National Park Service would enter into a memorandum of understanding to govern the management of these monuments, accounting for the land use standards binding on the departments and specifying each department's regulatory and budgetary responsibilities. We have concluded that this is a permissible option for structuring the management responsibilities of the two departments. *Id.*

n343 A 1972 agreement between the Departments of Agriculture and Interior accepted the conclusion of the 1933 Solicitor's Opinion, 54 Interior Dec. 314, 316, 1933 WL 1976 (Dep't of the Interior Oct. 24, 1933), that jurisdiction over pre-1933 monuments had been transferred to the National Park Service.

n344 4B Op. Off. Legal Counsel 396, 398-99 (1980) (emphasis added).

n345 Technically, however, the 1980 opinion only considers the possibility of shared management responsibilities, because that is all the USDA's General Counsel requested in seeking reconsideration of the 1979 opinion.

n346 See 37 Op. Att'y Gen. 418 (1934). Moreover, it may be inconsistent with the determination made in the 1979 Office of Legal Counsel Opinion that an effective reorganization plan or legislative action was necessary for the Forest Service to administer the monuments. 3 Op. Off. Legal Counsel 85, 90 (1979).

n347 Reorg. Plan No. 3 of 1950, reprinted in 5 U.S.C. app. at 105 (2000), and in 64 Stat. 1262 (1950).

n348 *Id.*

n349 *Id.* § 1(a).

n350 *Id.* § 2. The Departmental Manual implements the Reorganization Plan through secretarial delegations of various functions to various assistant secretaries and bureaus. Department of Interior, Department Manual, Parts 200-296, available at <http://elipse.doi.gov/table.cfm> (last visited Mar. 14, 2003). Since it was established in 1849, the most recent codification of the Department of the Interior restates the consolidation of authorities in the Secretary and the power to redistribute these authorities by delegation under Reorganization Plan No. 3. See 43 U.S.C. §§ 1451-1472 (2000).

n351 Congress ratified Executive Order No. 6,166 in 1984 as part of a sweeping legislative approval of plans put into effect under various reorganization acts after an appellate court retroactively struck down one such act on the

ground that it contained an unconstitutional legislative veto. EEOC v. CBC, Inc., 743 F.2d 969, 975 (2d Cir. 1984). The 1984 legislation included the Reorganization Act that authorized Executive Order No. 6,166 even though it did not contain an unconstitutional legislative veto. Act of Oct. 19, 1984, Pub. L. No. 98-532, 98 Stat. 2705. By its terms, however, the ratification language of the 1984 legislation did not purport to give prospective effect to orders such as Executive Order No. 6,166. Rather, it merely "ratifie[d] and affirm[ed] as law each reorganization plan" previously implemented, and further ratified "[a]ny actions taken prior" to 1984 "pursuant to a reorganization plan ratified and affirmed" under the 1984 law. *Id.*

n352 43 U.S.C. § 1702(j) (2000) (emphasis added). This language relating to the transfer of jurisdiction does not apply to "property" governed by the Federal Property and Administrative Services Act" which includes acquired lands. *Id.*

n353 See 43 U.S.C. § 1714(j) (2000) ("The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; modify or revoke any withdrawal creating national monuments.") (emphasis added).

n354 43 U.S.C. § 1714(i) (2000).

n355 See generally 43 C.F.R. § 2300 (1994) (governing FLPMA withdrawals); 43 C.F.R. § 2310.3 2(b)(3) (1994) (providing for NEPA compliance).

n356 The President's authority to designate a land management agency from within the Department of the Interior derives from one of at least two possible sources. First, the President may override Executive Order No. 6,166 with a subsequent executive order as is clearly contemplated in the 1934 Attorney General's Opinion. 37 Op. Att'y Gen. 418, 419-20 (1934). Alternatively, he can exercise the authority of the Secretary as his superior officer, under Reorganization Plan No. 3 of 1950, reprinted in 5 U.S.C. app. at 105 (2000), and in 64 Stat. 1262 (1950).

n357 Reorg. Plan No. 3 of 1950, reprinted in 5 U.S.C. app. at 105 (2000), and in 64 Stat. 1262 (1950). Since there is no transfer of jurisdiction under this scenario, FLPMA's withdrawal requirements would not come into play.

n358 Proclamation No. 6920, 3 C.F.R. 64 (1997).

n359 Proclamation No. 7374, 3 C.F.R. 199 (2001).

n360 43 U.S.C. § 1714(j) (2000).

n361 Proclamation No. 7266, 3 C.F.R. 13 (2001).

n362 Proclamation No. 7373, 3 C.F.R. 194 (2001).

n363 16 U.S.C. § 668dd(a)(3) (2000).

n364 Proclamation No. 7295, 3 C.F.R. 60 (2001).

n365 37 Op. Att'y Gen. 418, 418-20 (1934). This approach would run counter to the 1979 and 1980 opinions from the Office of Legal Counsel. See 4B Op. Off. Legal Counsel 396, 396-99 (1980); 3 Op. Off. Legal Counsel 85, 85-90 (1979).

n366 U.S. Const. art. II, §§ 1, 3.

n367 U.S. Const. art. III, § 2.

n368 5 U.S. (1 Cranch) 137, 177 (1803).

n369 Franklin v. Massachusetts, 505 U.S. 788, 788–801 (1992).

n370 Id.; see also 5 U.S.C. §§ 701–06 (2000).

n371 Harold H. Bruff, Judicial Review and the President's Statutory Powers, 68 Va. L. Rev. 1, 21 (1982). This approach has been followed by the Court of Appeals for the District of Columbia Circuit. See Chamber of Commerce v. Reich, 74 F.3d 1322, 1324 (D.C. Cir. 1996) (holding that nonstatutory judicial review of presidential actions generally is available).

n372 See Reich, 74 F.3d at 1324 (allowing such review). To support its decision, the Reich court relied substantially on *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902). In *McAnnulty*, the Court allowed an action to go forward seeking to restrain a subordinate from carrying out the orders of the Postmaster General. Id. at 97. The Court held that "in case an official violates the law to the injury of an individual, the courts generally have jurisdiction to grant relief." Id. at 96. While neither *McAnnulty*, nor any of the other cases cited by the court involved an action by the President, the court found that the fact that the challenged action was that of the President was not sufficient to "insulate the entire executive branch from judicial review." *Reich*, 74 F.3d at 1328. As for sovereign immunity, the court found that the "APA's waiver of sovereign immunity applies to any suit whether under the APA or not," citing previous decisions of the District of Columbia Circuit. Id.; see also *Clinton v. City of New York*, 524 U.S. 417, 420 (1998) (upholding constitutional challenge to President's exercise of "line item veto"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 660 (1952) (striking down, on constitutional grounds, executive order providing for seizure of steel mills in order to avert nationwide strike was not authorized by Constitution).

n373 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

n374 5 U.S.C. § 706(2) (2000).

n375 Bruff, *supra* note 371, at 51–57. Professor Bruff discusses several appellate court decisions which appear to follow this approach toward judicial review of presidential decisions, although perhaps not as rigorously as even this highly deferential standard might warrant. Id. Bruff also discusses *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cases (BNA) 1853 (D. Alaska 1980), a case challenging several national monument proclamations issued by President Carter to protect federal lands and resources in Alaska. Bruff's discussion of this case, however, appears in the context of congressional acquiescence to presidential decisions. Bruff, *supra* note 371, at 36–40. Since Carter's actions plainly were premised on a federal statute, this case might be viewed as supporting deferential review of presidential decisions made pursuant to a statute. See 16 U.S.C. § 1616(d)(2) (2000); see also notes 257–63 and accompanying text.

n376 58 F. Supp. 890 (D. Wyo. 1945).

n377 Id. at 894.

n378 5 U.S.C. § 706(2)(A) (2000).

n379 58 F. Supp. at 896; see also *Motor Vehicle Manufacturer's Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 43 (1971): [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' . . . Normally, agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Id. (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

n380 185 F. Supp. 2d 18 (D.D.C. 2001).

n381 Proclamation No. 7295, 65 Fed. Reg. 24,095 (Apr. 15, 2000).

n382 Tulare County, 185 F. Supp. 2d at 25.

n383 Id. at 25.

n384 Id.

n385 504 U.S. 555 (1992).

n386 Id. at 560.

n387 Id. (noting that injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical").

n388 Id.

n389 Id.

n390 Abbott Labs. v. Gardner, 387 U.S. 136, 148 49 (1967).

n391 Id. at 149.

n392 The government's authority to preclude public land mining on valid mining claims is the subject of intense debate. One of the chief critics of the law is John Leshy, the Solicitor at the Interior Department during the Clinton Administration. See generally John D. Leshy, *The Mining Law: A Study in Perpetual Motion* (1987). Toward the end of the Clinton Administration, the Department of the Interior promulgated a controversial rule which authorized the Bureau of Land Management to deny mining operation plans on otherwise valid mining claims if those operations would cause unnecessary and undue degradation of the public lands. 65 Fed. Reg. 69,998 (Nov. 21, 2000). The regulation was based upon a provision in FLPMA which requires the Secretary to "take any action necessary to prevent unnecessary or undue degradation of the [public] lands." 43 U.S.C. § 1732(b) (2000). The Bush Administration repealed this rule on October 31, 2001. 66 Fed. Reg. 54,834 (Oct. 30, 2001). A lawsuit has been filed by several environmental groups challenging the repeal. *Mineral Policy Ctr. v. Norton*, No. 01 CV 0073 (D.D.C. filed Jan. 16, 2001).

n393 In a similar context, the Supreme Court held that the Sierra Club's attempt to challenge the land use management plan for the Wayne National Forest was not ripe for review because the Sierra Club's potential injury from possible future logging activities would not occur until the Forest Service took some later action approving one or more timber sales. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 738 39 (1998). At that point, the Sierra Club could challenge the decision to allow logging, including any related issues that might have arisen under the land use plan. *Id.* at 733 34.

n394 Proclamation No. 6920, 3 C.F.R. 64 (1996). The President requested a recommendation on the proposal from Secretary Babbitt in July 1996. Telephone Interview with John Leshy, Former Solicitor, Department of the Interior (July 20, 2001). The designation followed after a favorable recommendation from the Secretary. *Id.*

n395 See, e.g., Grand Staircase Esclante National Monument: Before the Subcomm. on National Parks, Forests, and Lands of the House Comm. on Resources, 105th Cong. (1997) (statement of Gov. Michael O. Leavitt).

n396 See, e.g., The Wilderness Society, *The Antiquities Act: Protecting America's National Treasures*, available at www.wilderness.org/newsroom/pdf/antiquitieshandbook.pdf (last visited Feb. 25, 2003).

n397 During his second term, Clinton designated eighteen new monuments and expanded three others. See *infra* Appendix.

n398 Proclamation No. 7329, 3 C.F.R. 123 (2001).

n399 Proclamation No. 7265, 3 C.F.R. 7 (2001).

n400 See *infra* Appendix.

n401 Interior Solicitor John Leshy, who like Secretary Babbitt served for the entire Clinton term, also deserves much of the credit for developing the Antiquities Act strategy.

n402 See *infra* notes 403–51 and accompanying text.

n403 See *infra* notes 549–56 and accompanying text.

n404 See *infra* notes 549–56 and accompanying text.

n405 This should not be confused with another important "no surprises" policy established by Babbitt under the Endangered Species Act. See 63 Fed. Reg. 8859 (Feb. 23, 1998).

n406 See, e.g., Kettle Range Conservation Group, Answers to Frequently Asked Questions About the Columbus Mountain National Monument Proposal, available at <http://www.kettlerange.org/columbia.htm> (last visited Feb. 25, 2003) (noting that "Bruce Babbitt had a 'no surprises' policy regarding national monuments, requiring that local officials be made aware of a monument proposal before any formal process could begin").

n407 Charles Levendorsky, Latest Environmental Policy in to Lie and Plunder, N. County Times, Apr. 8, 2001, available at <http://www.nctimes.net/news/2001/20010408/kkkk.html> (last visited Mar. 14, 2003).

n408 Babbitt's willingness to meet personally with local officials was perhaps his most important commitment. His sophisticated understanding of public lands issues, combined with his well deserved reputation for working cooperatively with local communities to address practical concerns went a long way toward diffusing public criticism for the monuments that were ultimately proclaimed. See John Leshy, The Babbitt Legacy at the Department of the Interior: A Preliminary View, 31 Envtl. L. 199, 216–21 (2001) (discussing Babbitt's process in implementing protections on public lands).

n409 See John D. Leshy, Shaping the Modern West: The Role of the Executive Branch, 72 U. Colo. L. Rev. 287, 307–08 (2001) (discussing relationship between executive and legislative branches); Sarah Foster, President Targets More Monuments, WorldNetDaily, Apr. 20, 2000, available at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=18037 (last visited Feb. 25, 2003) (describing Secretary Babbitt's "promise . . . not to designate Steens Mountains as a monument if Oregon congressmen of both parties come up with legislation . . . acceptable to all parties").

n410 See *supra* notes 237–46 and accompanying text.

n411 Letter from President Bill Clinton to Bruce Babbitt, Secretary of the Interior (Nov. 10, 1998) (on file with author). The letter states in pertinent part: I would appreciate any recommendations you may have for further appropriate exercise of my authority under the Antiquities Act to protect objects of historic or scientific interest on federal lands. I will seriously consider and weigh any such proposals in the context of our overall efforts to save the most valuable, unique, and threatened places in America as a legacy for our children and grandchildren. *Id.*

n412 462 F. Supp. 1155 (D. Alaska 1978); see also *Tulare County v. Bush*, 185 F. Supp. 2d 18, 28–29 (D.D.C. 2001) (holding that presidential proclamation designating national forest as national monument is not agency action and thus not reviewable under NEPA).

n413 See *Carter*, 462 F. Supp. at 1160.

n414 Babbitt served as the Arizona Attorney General from 1975–1978 and was Governor of Arizona from

1978 1987. He currently serves as Of Counsel at the law firm of Latham & Watkins in Washington D.C.

n415 If it appeared that the resources proposed for protection might be threatened with adverse impacts while the proposal was pending, the Secretary would consider a temporary withdrawal of lands under FLPMA § 204(e). 43 U.S.C. § 1714(e) (2000).

n416 See, e.g., Bruce Babbitt, Remarks at the University of Denver Law School (Feb. 17, 2000), available at <http://www.doi.gov/news/archives/000222b.html> (last visited Feb. 25, 2003). During his speech he noted that he was "on his way to Grand Junction" where he planned to "join a dialogue" to protect what later would become the Canyons of the Ancients National Monument. *Id.*; see also Proclamation No. 7317, 65 Fed. Reg. 37,243 (June 9, 2000).

n417 See *infra* notes 552 56 and accompanying text. The Secretary understood that the Antiquities Act was vulnerable to political attack, and that the more the law was used, the more likely it would be that opponents would try to amend or repeal it.

n418 During the course of his tenure, Secretary Babbitt developed a knack for engaging the public on controversial issues in a personal and highly effective manner. Most notable to this observer was his willingness to respond directly and honestly to questions asked even when he knew his response would not be well received by the questioner.

n419 For example, in the Sonoran Desert National Monument, in response to concerns by the utility industry, language was added in the memorandum supporting the proclamation indicating that new rights of way could be approved through the monument, subject to a requirement that they be consistent with the monument management plan. See Bureau of Land Management, Arizona State Office, Sonoran Desert National Monument Background Materials, available at http://www.az.blm.gov/fr_nlcs.htm (last modified Oct. 18, 2002) ("Nothing in this proclamation precludes the issuance of new rights of way within existing right of way corridors, so long as the BLM determines, after NEPA compliance, that such rights of way are consistent with the purposes of protecting the objects for which the monument was established and the monument's management plan."). In the same proclamation, at the State of Arizona's request, the monument boundaries were adjusted to exclude state lands along the borders of the monument. Proclamation No. 7397, 66 Fed. Reg. 7354 (Jan. 22, 2001).

n420 See, e.g., Proclamation No. 794, 35 Stat. 2175 (1908); Proclamation No. 160, 35 Stat. 2162 (1907).

n421 See, e.g., Proclamation No. 4622, 93 Stat. 1465 (1978); Proclamation No. 4623, 93 Stat. 1466 (1978).

n422 See, e.g., Proclamation No. 7374, 3 C.F.R. 199 (2001); Proclamation No. 7295, 65 Fed. Reg. 24095 (Apr. 15, 2000).

n423 See, e.g., Proclamation No. 7397, 3 C.F.R. 22 (2001); Proclamation No. 6920, 61 Fed. Reg. 50223 (Sept. 18, 1996).

n424 See, e.g., Proclamation No. 7398, 66 Fed. Reg. 7359 (Jan. 17, 2001); Proclamation No. 7394, 66 Fed. Reg. 7343 (Jan. 17, 2001). It is not entirely clear whether this language prohibits new road construction within these monuments, although that appears to have been the intent. Several of the proclamations require preparation of a transportation plan to address road closures and travel restrictions. See, e.g., Proclamation No. 7398, 66 Fed. Reg. 7359 (Jan. 17, 2001); Proclamation No. 7343, 66 Fed. Reg. 7343 (Jan. 17, 2001). In other cases, a general management plan is required. See, e.g., Proclamation No. 7399, 3 C.F.R. 32 (2001) (requiring Secretary to prepare management plan "which addresses . . . specific actions necessary to protect the objects identified in this proclamation").

n425 For example, the Sonoran Desert proclamation disavows any intent to reserve new water rights. Proclamation No. 7397, 66 Fed. Reg. 7,354 (Jan. 17, 2001). By contrast, the Hanford Reach proclamation expressly reserves "a quantity of water in the Columbia River sufficient to fulfill the purposes for which this monument is

established." Proclamation No. 7319, 65 Fed. Reg. 37,253 (June 9, 2000).

n426 Although the official memoranda to the President were not released, all of the substantive data contained in the memoranda, including the bibliography, were released to the public at the time that the recommendation to the President was announced. Although these documents may not be readily available in all cases, many are available online. The Bureau of Land Management office in Arizona provides access to relevant monument documents at http://www.az.blm.gov/fr_nlcs.htm (last visited Feb. 25, 2003).

n427 See *supra* note 426 and accompanying text.

n428 At the University of Denver Law School on February 17, 2000, Babbitt spoke eloquently about how archaeological sites ought not be viewed in isolation, but rather as part of a landscape or "anthropological ecosystem." Bruce Babbitt, Remarks at the University of Denver Law School (Feb. 17, 2000), available at <http://www.doi.gov/news/archives/000222b/> html (last visited Feb. 25, 2003). Secretary Babbitt stated, "The real science on these landscapes doesn't come out of digging out a room and extracting a few pots. . . . The real discoveries today come from asking the deeper question of 'How did communities manage to live in spiritual and physical equilibrium with the landscape?'" *Id.* Babbitt described the Agua Fria National Monument as: a defensive community on the ramparts up above Phoenix. . . . [T]hey've located line of sight watchtowers and shown how these huge Pueblo ruins were built in defensive array around about 100,000 acres. The whole landscape is kind of a Masada in central Arizona. As a single ruin it's not a very interesting place. But all of the sudden you think of Masada and how this all fits together and it's a starburst of revelation and the protection is fitted to the landscape. *Id.*

n429 See, e.g., Proclamation No. 6920, 61 Fed. Reg. 50223 (Sept. 18, 1996); Proclamation No. 7394, 66 Fed. Reg. 7343 (Jan. 17, 2001). This also allowed the Department of Interior to avoid potentially difficult issues regarding the President's authority to transfer management jurisdiction over national monument lands. See *supra* notes 292 365 and accompanying text.

n430 See, e.g., George Cameron Coggins & Doris K. Nagel, "Nothing Beside Remains": The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy, 17 B.C. Envtl. Aff. L. Rev. 473, 483 (1990) (noting that Bureau of Land Management "has long been considered a model of the 'capture' phenomenon because some of its operations essentially have been controlled by the entities that the agency is supposed to regulate").

n431 See, e.g., Jenny Jackson, Redrocks, Forest Voice O n l i n e , a v a i l a b l e a t h t t p : / / w w w . forestcouncil.org/voice/issues/02 fall/redrocks3.php (last visited Feb. 25, 2003). The article notes that "[t]he BLM is sometimes called the 'Bureau of Livestock and Mining.' It's a title it often deserves." *Id.*

n432 In his University of Denver Law School speech, Babbitt noted that: the largest [public] land manager [the BLM] ought to have a sense of pride rather than simply having a bunch of inventory out in the garage that is discovered and given to someone else. . . . I think you give an institution some pride and some direction, not by stripping it [of] its best assets. Babbitt, *supra* note 428.

n433 See Bureau of Land Management, Questions and Answers: National Landscape Conservation System, available at <http://www.blm.gov/nhp/news/releases/pages/2000/ NLCSQ&As.615a.htm> (last modified June 29, 2000) (noting system is designed to include national monuments, national conservation areas, wilderness areas and wilderness study areas, national wild and scenic rivers, and national scenic and historic trails on BLM land).

n434 *Id.* (noting that "management will focus on conservation").

n435 *Id.* ("While there will be opportunities for visitation, there will be no major facilities located within these areas. Visitor contact and information facilities will be located in adjacent communities or at the periphery of the units.").

n436 *Id.*

n437 See, e.g., Proclamation No. 7398, 66 Fed. Reg.7359 (Jan. 17, 2001) ("Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State of Montana with respect to fish and wildlife management."). The State of Arizona has complained, however, that its ability to manage monument lands is unduly restricted. See The Wilderness Society, National Monument Designation in Arizona: Governor Hull's Letter and the F a c t s , a t 2 , a v a i l a b l e a t <http://www.wilderness.org/newsroom/pdf/hull letter factsheet.pdf> (last visited Feb. 25, 2003). The State's complaint arose in the context of an attempt by the Arizona Game and Fish Department to chain an area within the Grand Canyon Parashant National Monument to improve wildlife habitat. Id. The Bureau of Land Management refused to allow the chaining because it was contrary to the Bureau's policies. See Bureau of Land Management, Interim Management Policy, BLM National Monuments, available at <http://www.blm.gov/nhp/efoia/wo/woerr.html> (last visited Feb. 25, 2003). Subsequently, when the Secretary proposed to designate the Sonoran Desert National Monument, the State of Arizona sought assurances that it would be allowed to retain its artificial water holes, which are maintained for wildlife purposes. See Proclamation No. 7397, 66 Fed. Reg. 7354 (Jan. 17, 2001).

n438 See *supra* note 234 and accompanying text.

n439 See Steens Mountain Cooperative Management and Protection Act, 16 U.S.C. § 460nnn 23(e) (2000) (requiring cancellation of certain grazing permits "on Federal lands in the Fish Creek/Big Indian, East Ridge, and South Steens allotments," and prohibiting future grazing on these lands).

n440 Proclamation No. 7318, 65 Fed. Reg. 37,249 (June 9, 2000); see also Bureau of Land Management, Cascade Siskiyou National Monument: Draft Study of Livestock Impacts on the Objects of Biological Interest (Apr. 2001), available at <http://www.or.blm.gov/medford/docs/CSNM Range Study.pdf> (last visited Feb. 25, 2003).

n441 See Bureau of Land Management, Cascade Siskiyou National Monument: Frequently Asked Questions, available at <http://www.or.blm.gov/csmr/faq.htm#1> (last visited Feb. 25, 2003) (responding to question on grazing, Bureau states that allotments within monument may be restricted or retired if grazing is found to be incompatible with area's natural ecosystem).

n442 See, e.g., Proclamation No. 7374, 3 C.F.R. 199 (2000); Proclamation No. 7295, 65 Fed. Reg. 24095 (Apr. 15, 2000). In 1908, Secretary of the Interior James Garfield addressed several rights of way applications that had been filed by the Grand Canyon Scenic Railroad Company through the Grand Canyon National Monument. See 36 Pub. Lands Dec. 394, 1908 WL 837 (Dep't of the Interior May 1, 1908). The language of the Grand Canyon proclamation was even broader than that included in the Clinton era proclamations. It reserved the land "from appropriation and use of all kinds under all of the public land laws, subject to all prior, valid adverse claims." Proclamation No. 794, 35 Stat. 2175 (1908). The Secretary held that the Department was "without authority to approve [the] applications for rights of way." 36 Pub. Lands Dec. at 394.

n443 See, e.g., Bureau of Land Management, Grand Canyon Parashant National Monument Background Materials (Jan. 11, 2000), available at <http://www.az.blm.gov/parashant/bkgdp.htm> (last visited Feb. 25, 2003) (containing background memorandum issued by Secretary of the Interior in conjunction with monument proclamation).

n444 *Id.*

n445 Arizona Bureau of Land Management, Sonoran Desert National Monument Background Materials, available at <http://www.az.blm.gov/sonoran/sdbkgd.htm> (last visited Mar. 14, 2003).

n446 See, e.g., Sonoran Desert National Monument, Proclamation No. 7397, 66 Fed. Reg. 7,354 (Jan 22, 2001); Proclamation No. 7295, 65 Fed. Reg. 24095 (Apr. 15, 2000).

n447 See 43 U.S.C. § 1712 (2000) (requiring land use planning on BLM lands).

n448 This is clear from the language of the proclamations which generally limits or precludes uses, and

which makes the monument the "dominant reservation." See, e.g., Proclamation No. 7374, 3 C.F.R. 199 (2001); Proclamation No. 7295, Fed. Reg. 24095 (Apr. 15, 2000).

n449 Bureau of Land Management, Interim Management Policy for Newly Created National Monuments (Jan. 11, 2000), available at <http://www.az.blm.gov/interimgt.htm> (last visited Oct. 25, 2002).

n450 Bureau of Land Management, The Grand Staircase Escalante National Monument Approved Management Plan/Record of Decision, at ch. 2, p. 9 (Feb. 2000), available at <http://www.ut.blm.gov/monument/monumentmanagement/Plan/rod/introduction.html> (last visited Feb. 25, 2003).

n451 Id. The final management plan sets aside 65% of the monument in a "Primitive" zone. The Bureau plans to provide no facilities in this zone and will post only such signs as are necessary for public safety or resource protection. Id. No motorized or mechanized vehicles (including bicycles) are authorized in this zone. Id. Approximately 4% of the land will be in the "Frontcountry" zone, which will be the "focal point of visitation," although visitor centers themselves will be placed outside of the monument and in the local communities. Id. at ch. 2, p. 8. The "Passage" zone encompasses 2% of the monument and includes the main travel routes. Id. at ch. 2, p. 9. The remaining 29% of the land is in the "Outback" zone where motorized and mechanized access will be accommodated, but only on designated routes. Id.

n452 U.S. Const. art. IV, § 3, cl. 2.

n453 Ten national monuments have been abolished, see *infra* Appendix, but the lands encompassing at least four of these monuments were conveyed to the state or local government for use as a public park with a reverter to the United States if the lands ceased to be used as a park. See *Verendrye*, 40 Stat. 1677, 1677 (1917), repealed by Act of July 30, 1956, Pub. L. No. 84-846, 60 Stat. 712, 712; *Papago Sagualo*, 38 Stat. 1991, 1991 (1914), repealed by Act of Apr. 7, 1930, Pub. L. No. 71-92, 46 Stat. 142, 142; *Shoshone Cavern National Monument*, 36 Stat. 2501, 2501-02 (1909), repealed by Act of May 17, 1954, Pub. L. No. 83-360, 68 Stat. 98, 98.

n454 Congress has ratified more than half of all of the designated monuments, often by expanding their boundaries or designating the lands as a national park. See *infra* Appendix.

n455 See *Leshy*, *supra* note 409, at 305-07.

n456 See, e.g., S. 357, 105th Cong. § 4(a)(2) (1997). Under § 4(a)(2) of the proposed legislation, the Secretary would be required to "manage the resources within the Monument in accordance with the principles of multiple use and sustained yield (including recreation, range, timber, minerals, oil and gas, watershed, wildlife, fish, and natural scenic, scientific, and historical values), using principles of economic and ecologic sustainability." Id.

n457 Utah Schools and Lands Exchange Act of 1998, Pub. L. No. 105-335, 112 Stat. 3139, 3141.

n458 Pub. L. No. 105-355, 112 Stat. 3139, 3247 (1998).

n459 See *id.* § 201, 112 Stat. at 3252-53 (modifying boundaries of Grand Staircase Escalante National Monument and conveying certain lands to Utah).

n460 See, e.g., 39 Op. Att'y Gen. 185 (1938); see also Pamela Baldwin, Authority of a President to Modify or Eliminate a Monument, Cong. Research Serv. Rep. No. R.S. 20647 (Aug. 3, 2000).

n461 16 U.S.C. § 431 (2000).

n462 *Id.*

n463 Proclamation No. 1713, reprinted in 43 Stat. 1968 (1924).

n464 39 Op. Att'y Gen. 185, 185 (1938); see also Pamela Baldwin, *supra* note 460. Baldwin notes that FLPMA § 204(j) specifically provides that the Secretary of the Interior shall not "modify or revoke any withdrawal creating national monuments under the [Antiquities] Act of June 8, 1906." 43 U.S.C. § 1714(j) (2000).

n465 39 Op. Att'y Gen. 185, 187 (1938) (quoting 10 Op. Att'y Gen. 359 (1862)).

n466 39 Op. Att'y Gen. 185, 188 (1938).

n467 *Id.*

n468 *Id.*

n469 *Id.* (citing Pickett Act of 1910, Pub. L. No. 61-303, 36 Stat. 847. National Forest Organic Act of 1897, 30 Stat. 11 (1897)). The Pickett Act authorized the President to "temporarily withdraw . . . public lands . . . such withdrawals . . . [to] remain in effect until revoked by him or by an Act of Congress." Pickett Act, 36 Stat. 847, repealed by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 70-4(a), 90 Stat. 2792 (emphasis added). The National Forest Organic Act provided in relevant part that "[t]he President is hereby authorized . . . to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve." 30 Stat. 11, 36, repealed in part by National Forest Management Act of 1976, 36 U.S.C. § 1609(a) (2000).

n470 39 Op. Att'y Gen. 185, 188 (1938).

n471 Act of Mar. 29, 1956, Pub. L. No. 447, 70 Stat. 61, 61.

n472 See *infra* Appendix (providing names, locations, and dates for other monuments that Congress abolished).

n473 See Rothman, *supra* note 22, at 34.

n474 16 U.S.C. § 431 (2000).

n475 U.S. Const. art. IV, § 3, cl. 2.

n476 David Brower, a renowned conservationist, offered his assessment of the tenuous nature of land protection measures, noting that "[a]ll a conservation group can do is to defer something. There's no such thing as a permanent victory. After we win a battle, the wilderness is still there, and still vulnerable. When a conservation group loses a battle, the wilderness is dead." John McPhee, *Encounters with the Archdruid* 61 (1971).

n477 Enlarging a monument does not raise the same issue, since the enlargement would not be valid unless it includes lands that are needed to protect the objects identified in the original proclamation, or embraces separate objects suitable for protection under the law. Accordingly, a valid enlargement is either necessary to fulfill the purposes of the original proclamation, or is capable of standing on its own as a new monument.

n478 See 39 Op. Att'y Gen. 185, 186-87 (1938) ("[T]he reservation made by the President . . . under the statute was in effect a reservation by the Congress itself and that the President thereafter was without power to revoke or rescind the reservation.").

n479 *Id.*

n480 *Id.* at 188.

n481 Act of June 4, 1897, 30 Stat. 11, 36 (1897) (emphasis added).

n482 39 Op. Att'y Gen. 185, 188 (1938) (quoting Antiquities Act, 16 U.S.C. § 431 (2000)).

n483 39 Op. Att'y Gen. 185, 188 (1938).

n484 See, e.g., Proclamation No. 4611, 93 Stat. 1446, 1447 (1978); Proclamation No. 7295, 65 Fed. Reg. 24095 (Apr. 15, 2000).

n485 39 Op. Att'y Gen. 185, 185 (1938).

n486 For example, when President Taft proclaimed the Navajo National Monument, he set aside: [A]ll prehistoric cliff dwellings, pueblo and other ruins and relics of historic peoples, situated upon the Navajo Indian Reservation, Arizona, between the parallels of latitude thirty six degrees thirty minutes North, and thirty seven degrees North, and between longitude one hundred and ten degrees West and one hundred and ten degrees forty five minutes West. Proclamation No. 873, 36 Stat. 2491 (1909). As described, the monument encompassed more than 100,000 acres of land. Hal K. Rothman, Navajo National Monument: A Place and its People, ch. 2 (1991), available at <http://www.nps.gov/nava/adhi/adhi.htm> (last visited Feb. 25, 2003). The designation was made because William B. Douglass, the Examiner of Surveys for the General Land Office, was concerned about the imminent exploitation of the site by an approaching expedition even before Douglass had the opportunity to survey the site and identify the precise location of the ruins. *Id.* After the monument was proclaimed, even Douglass recognized that the area reserved "was far larger than necessary to protect the ruins." *Id.* at ch. 2, text accompanying note 18. Less than three years after he created the monument, Taft signed a proclamation reducing its size to two 160 acre tracts that were within the monument's original boundaries and one additional forty acre tract that included another nearby ruin. Proclamation No. 1186, 37 Stat. 1733, 1733 34 (1912). While pressure to reduce the size of the monument came from the livestock industry, and while the government's limited information regarding the ruins may have led to the omission of some sites that should have been retained, the original proclamation only reserved the ruins themselves rather than the land. See Rothman, *supra* note 486, at ch. 2, text accompanying notes 34 and 35.

n487 See *supra* notes 366 84 and accompanying text.

n488 Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917); Causey v. United States, 240 U.S. 399, 402 (1916); Light v. United States, 220 U.S. 523, 537 (1911); United States v. Trinidad Coal & Coking Co., 137 U.S. 160, 170 (1890).

n489 See Rothman, *supra* note 22, at 34.

n490 39 Op. Att'y Gen. 185, 185 (1938).

n491 *Id.* at 188.

n492 See *infra* notes 493 539 and accompanying text.

n493 Proclamation No. 1191, 37 Stat. 1737 (1912).

n494 Opinion of Apr. 20, 1915 (cited in Opinion of January 30, 1935, M 27657) (on file with Office of the Solicitor, U.S. Department of the Interior).

n495 The Assistant Attorney General's opinion is reproduced at 14 Pub. Lands Dec. 209, 1892 WL 489 (Dep't of the Interior Feb. 19, 1892). The General Revision Act, formerly codified at 16 U.S.C. § 471 (2000), was modified by the Congress on several occasions, and was ultimately repealed in its entirety in 1976. Federal Land Policy and Management Act of 1976, Pub. L. 94-579, § 704(a), 90 Stat. 2792. In 1892, when the statute was construed by the Assistant Attorney General, it provided as follows: That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits

thereof. 26 Stat. 1103 (1891).

n496 16 U.S.C. § 471 (repealed 1976).

n497 14 Pub. Lands Dec. at 210. The Assistant Attorney General's Forest Reservation opinion also relies on *Grisar v. McDowell*, 73 U.S. 363 (1867), in which the Supreme Court noted that the President had the "same authority" to modify a reservation of public land as he had to make it in the first instance. *Id.* at 371. The *Grisar* case is not especially helpful, however, in analyzing the Antiquities Act because the President exercised implied authority to make the reservation in *Grisar*, and the scope of that authority therefore was not confined by legislative language. *Id.* at 381. The Forest Reservation opinion also relied on an old circuit court decision which involved public lands that had been reserved for military purposes but that were subsequently abandoned by the military after they were no longer needed for that purpose. 14 Pub. Lands Dec. 209, 210 (1892). Associate Justice McLean found that under these circumstances "the reserve falls back into the mass of public lands subject to be sold under the general law." *United States v. R.R. Bridge Co.*, 27 F. Cas. 686, 690 (1855). However, lands reserved for a narrow purpose, such as military use, are very different from lands reserved for the protection of antiquities or objects of scientific interest. In the former situation, the land is reserved for a specific use. In the latter situation the land is reserved to protect objects found to exist there. Thus, while it might reasonably be argued that a reservation for military purposes should be allowed to revert to the public domain when that use is no longer needed, it is far more difficult to claim that lands reserved for the protection of specific objects found on those lands can be restored to the public lands whenever a future President makes a different judgment than his predecessor about the merits of protecting those objects. Moreover, the Railroad Bridge decision was thoroughly refuted in a subsequent opinion of the Attorney General involving the very same military lands. 10 Op. Att'y Gen. 359, 370-71 (1862). The Solicitor's opinion mentions this opinion from the Attorney General but rejects it without analysis. Opinion of Apr. 20, 1915 (cited in Opinion of Jan. 30, 1935, M 27657) (on file with Office of the Solicitor, U.S. Department of the Interior).

n498 10 Op. Att'y Gen. 359, 370-71 (1862); see also *supra* note 497.

n499 See 16 Op. Att'y Gen. 121, 123 (1878) (stating that lands set aside by President for military purposes cannot be restored to condition of public lands except by Congress).

n500 14 Pub. Lands Dec. at 209-13.

n501 1915 Solicitor's Opinion at 4 (on file with Office of the Solicitor, U.S. Department of the Interior). Shortly before the Solicitor issued his opinion, the Supreme Court in *United States v. Midwest Oil Co.*, 236 U.S. 459, 511-12 (1915), had upheld the president's implied authority to reserve lands for various purposes.

n502 Indeed, the Attorney General merely "conceded," for the sake of argument, that "the President could not have selected a portion of public lands and . . . devoted it to military purposes." 10 Op. Att'y Gen. 359, 363 (1862). He did not rely on this fact to reach his conclusion that the express delegation to the President was a limited one. *Id.* at 364-65.

n503 Opinion of June 3, 1924, M 12501, M 12529 (cited in Opinion of January 30, 1935, M 27657) (on file with Office of the Solicitor, U.S. Department of the Interior).

n504 32 Op. Att'y Gen. 488, 488-91 (1921). This 1921 opinion involved lands that had been reserved for military purposes for use as a lighthouse. *Id.* at 489. A 1913 statute authorized the Department of Commerce to sell land that could not "profitably be used in Lighthouse Service," but the Interior Department argued that lands no longer needed for military purposes should revert to the public domain. *Id.* The Attorney General disagreed, finding that "lands reserved out of the public domain for specific Government purposes can thereafter be disposed of only as directed by Congress." *Id.* at 490. The opinion goes on to find that: The power to thus reserve public lands and appropriate them . . . does not necessarily include the power to either restore them to the general public domain or transfer them to another department. This department has repeatedly held that lands reserved for military purposes cannot be restored to the public domain without an Act of Congress. *Id.*

n505 Opinion of June 3, 1924, M 12501, M 12529 (cited in Opinion of January 30, 1935, M 27657) (on file with Office of the Solicitor, U.S. Department of the Interior).

n506 Pickett Act, Pub. L. No. 61 303, 36 Stat. 847 (1910), repealed by Federal Land Policy and Management Act of 1976, Pub. L. No. 94 579, § 704(a), 90 Stat. 2792.

n507 Id.

n508 Opinion of June 3, 1924, M 1205, M 12529 (cited in Opinion of January 30, 1935, M 27657) (on file with Office of the Solicitor, U.S. Department of the Interior).

n509 Opinion of Jan. 30, 1935, M 27657 (on file with Office of the Solicitor, U.S. Department of the Interior).

n510 National Monuments, 60 Interior Dec. 9 (Dep't of the Interior July 21, 1947).

n511 Opinion of Jan. 30, 1935, M 27657 (on file with Office of the Solicitor, U.S. Department of the Interior).

n512 Id.

n513 236 U.S. 459 (1915).

n514 See id. at 468 69.

n515 Opinion of Jan. 30, 1935, M 27657 at 4 5 (on file with Office of the Solicitor, U.S. Department of the Interior).

n516 Act of Oct. 21, 1976, Pub. L. No. 94 579, § 704(a), 90 Stat. 2792, 2792.

n517 This position also would appear to be inconsistent with the 1938 Attorney General's opinion, which suggests that the Antiquities Act contains a limited delegation of authority. See 39 Op. Att'y Gen. 185, 186 (1938).

n518 39 Op. Att'y Gen. 185, 186 (1938).

n519 16 U.S.C. § 431 (2000).

n520 See supra note 486 and accompanying text.

n521 Proclamation No. 869, 35 Stat. 2247, 2247 (1909). While Roosevelt was familiar with the Olympic peninsula and its elk herd, he was not personally engaged in the details of the proposed monument or the land that would be protected. Lien, supra note 115, at 37 38. In signing the proclamation just two days before he left office, Roosevelt relied entirely on the recommendation of Congressman William E. Humphrey of Seattle, Washington. Id. In a meeting at the White House, Roosevelt told Humphrey, "Tell me what you want . . . and I will give it to you." Id. at 37. Humphrey replied that he wanted a 750,000 acre monument in the heart of the Olympic mountains. Id. at 37. Roosevelt responded, "Prepare your order and I will sign it." Id. at 38. Ironically, Humphrey fully supported continued logging in the monument and, at Humphrey's request, Gifford Pinchot drafted language for the proclamation that was intended to ensure this result. Id. at 38 39. Pinchot also decided to exclude some heavily forested areas with both major elk herds and heavy stands of timber, thus leading to a monument proposal smaller than Humphrey had originally proposed to the President. Id. at 38.

n522 Proclamation No. 1293, 39 Stat. 1726, 1726 (1915). The following two additional proclamations reduced the size of the Mount Olympus National Monument, but were very minor: a 1912 proclamation by President Taft reduced the monument by 160 acres, Proclamation No. 1191, 37 Stat. 1737, 1737 (1912), and a 1929 proclamation by President Coolidge reduced the monument by 640 acres, Proclamation No. 1862, 45 Stat. 2984, 2984 85 (1929).

n523 Opinion of Jan. 30, 1935, M 27657, at 4 (on file with Office of the Solicitor, U.S. Department of the Interior).

n524 Lien, *supra* note 115, at 52. Another historian has suggested that elk were in fact using the areas that were eliminated from the monument, but that the Forest Service believed it could adequately protect them. Gerald W. Williams, Ph.D., *The USDA Forest Service in the Pacific Northwest: Major Political and Social Controversies Between 1891-1945*, available at http://fs.jorge.com/archives/history/Regional/R6_History1891T01945.htm (last visited Mar. 21, 2003).

n525 Ruby El Hult, *The Untamed Olympics* 214-15 (1954).

n526 For example, "[Chief Forester of the Forest Service Henry J. Graves] recommended for elimination, with one exception everything the timber industry controlled Seattle Chamber of Commerce had recommended for elimination. For good measure he removed another six miles of the heaviest timber which they had not asked for." Lien, *supra* note 115, at 51-52. Graves's recommendations were accepted by President Wilson in his May 11, 1915 proclamation. *Id.* at 52. Subsequently, during hearings on proposals for an Olympic National Park, Graves admitted that his support for eliminating lands from the original monument was in error. *Id.* at 54.

n527 As noted previously, Gifford Pinchot had added language to the original proclamation that he thought would allow logging to continue inside the monument. *Id.* at 38-39; see also *supra* note 521 and accompanying text. But the language was in conflict with other language declaring the monument to be the dominant reservation and forbidding uses interfering with the preservation and protection of the monument. Lien, *supra* note 115, at 38-39. After the Forest Service realized it would not be allowed to log in the monument, it tried to have the monument abolished altogether. *Id.* at 37-39, 50-52. When this failed, it settled for reduction of the monument's size by half, and a return of the eliminated lands to the forest preserve. *Id.*

n528 Hult, *supra* note 525, at 215.

n529 *Id.*

n530 Act of June 29, 1938, ch. 812, Pub. L. No. 75-778, 52 Stat. 1241, 1241-42 (codified as amended at 16 U.S.C. § 251 (2000)).

n531 See *id.*

n532 Proclamation No. 2022, 47 Stat. 2547, 2547-48 (1932).

n533 See Barbara J. Morehouse, *A Place Called Grand Canyon* 73-79 (1996) (discussing ranchers' and officials' efforts to eliminate or reduce size of monument). While these were public lands at the time and not subject to local taxes, local officials hoped that these lands would eventually become private lands through the operation of the homestead, mining, or similar laws. See *id.* (discussing bills proposed to reduce size of monument).

n534 *Id.* at 74-78.

n535 Proclamation No. 2393, 3 C.F.R. 150 (1938-1943).

n536 16 U.S.C. § 431 (2000).

n537 *Id.*

n538 Congress plainly understands how to grant the President the authority to reduce the size of a national monument, and it has done so in at least one statute, which provides for the creation of the Colonial National Monument in Virginia. That statute provides that the boundaries of the monument "may be enlarged or diminished by subsequent proclamations of the President upon the recommendation of the Secretary of the Interior." Act of

July 3, 1930, Pub. L. No. 71-510, 46 Stat. 855 (codified as amended at 16 U.S.C. § 81a (2000)) (emphasis added).

n539 See, e.g., Proclamation No. 1186, 37 Stat. 1733 (1912) (reducing size of Navajo National Monument); Proclamation No. 2454, 3 C.F.R. 208 (1938-1943) (eliminating 52.27 acres from Wupatki National Monument to allow for irrigation of lands on Navajo Indian Reservation); Proclamation No. 3138, 3 C.F.R. 73 (1954-1958) (eliminating 9,880 acres from Great Sand Dunes National Monument and adding 960 acres); Proclamation No. 3307, 3 C.F.R. 49 (1959-1963) (eliminating 211 acres from Colorado National Monument, but adding 120 acres); Proclamation No. 3360, 3 C.F.R. 83 (1959-1963) (eliminating 720 acres from Arches National Monument because lands were used for grazing and had no known scenic or scientific value); Proclamation No. 3344, 3 C.F.R. 74 (1959-1963) (eliminating approximately 470 acres from Black Canyon of Gunnison National Monument).

n540 Congressman Nick Rahall quotes Secretary Norton from a letter to the State of Arizona, as follows: I would like to hear from you about what role these monuments should play in Arizona. Are there boundary adjustments that the Department of Interior should consider recommending? Are there existing uses inside these monuments that we should accommodate? 147 Cong. Rec. H,3418 (June 21, 2001) (statement of Rep. Rahall).

n541 Despite the Attorney General's apparent willingness to accept without analysis presidential modifications of national monuments, language from the 1938 opinion offers a powerful argument against this conclusion. As the Attorney General noted, "[U]nless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can." 39 Op. Att'y Gen. 185, 187 (1938). The Antiquities Act simply does not confer upon the President the power to modify a legitimate action taken under the law by a predecessor.

n542 16 U.S.C. § 431 (2000).

n543 See *supra* notes 523-27 and accompanying text.

n544 See, e.g., Vermilion Cliffs National Monument, Proclamation No. 7374, 3 C.F.R. 199 (2001); Proclamation No. 7295, 65 Fed. Reg. 24095 (Apr. 15, 2000).

n545 Mike Soraghan, Bush: National Monuments Have Oil Drilling Potential, *Denv. Post*, Mar. 15, 2001, at A1 (quoting President George W. Bush's statement that "[t]here are parts of the monument lands where we can explore without affecting the overall environment").

n546 See Proclamation No. 7397, 3 C.F.R. 22 (2001).

n547 *Id.*

n548 See *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) ("[J]udicial review is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority.").

n549 *One Third of Our Nation's Land: A Report to the President and the Congress by the Public Land Law Review Commission*, 54-56 (1970). Recommendation 8 is that only Congress should approve withdrawals of a permanent or indefinite term. *Id.* at 54. Recommendation 9 is that "Congress should establish a formal program by which withdrawals would be periodically reviewed and either rejustified or modified." *Id.* at 56.

n550 Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976); see also H.R. Rep. No. 94-1163, at 29 (1976).

n551 In addition to repealing most of the other statutory withdrawal authorities, Congress repealed the implied authority of the President to make withdrawals and reservations resulting from the acquiescence of the Congress, which was approved by the Supreme Court in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). A leading public lands treatise has suggested, however, that since the power arose from congressional inaction in the face of

executive action, it cannot simply be repealed. 2 George Coggins & Robert Glicksman, *Public Natural Resources Law*, § 10D.03[2][b] (1997). Rather, it is "regenerable and effective" until Congress objects to a particular exercise of the power." Id. Moreover, it can be argued that, even to the extent that FLPMA's repeal of Midwest Oil is effective, the repeal is applicable only to "public lands" which is the subject matter of FLPMA. Public lands is defined in FLPMA to encompass only certain lands managed by the Bureau of Land Management, and expressly excludes lands on the outer continental shelf. 43 U.S.C. § 1702(e) (2000). Under this view, Midwest Oil still might be used to designate national monuments on outer continental shelf lands. The Office of Legal Counsel rejected this argument in an opinion addressing the issues relating to a proposal to establish a national wildlife refuge on submerged lands in the northwestern Hawaiian Islands. Memorandum from Randolph D. Moss, Assistant Attorney General, U.S. Department of Justice, to John Leshy, Solicitor, Department of Interior, James Dorskind, General Counsel, National Organic and Atmospheric, Administration, and Dinah Bear, General Counsel, Counsel on Environmental Quality 4-9 (Sept. 15, 2000), available at <http://www.atlantisforce.org/doj1.html> (last visited Feb. 16, 2003). In a footnote, however, the OLC opinion concedes that the President might have the authority to establish a national wildlife refuge for national defense or foreign affairs purposes. Id. at 19 n.25.

n552 See, e.g., *National Monument NEPA Compliance Act*, H.R. 1487, 106th Cong. (1999). The House passed H.R. 1487 by a vote of 408 yeas to 2 nays. 145 Cong. Rec. D,1033 (1999). This bill would have required preparation of a draft and final environmental impact statement (EIS) on any monument proposal including a minimum six month comment period on a draft EIS and at least a four month comment period on a final EIS before a proclamation is issued. H.R. 1487 § 3. A similar bill requires various forms of public participation before a monument can be proclaimed. *National Monument Public Participation Act*, S. 729, 106th Cong. (1999). Bills that effectively would repeal presidential authority to proclaim national monuments include the following: *National Monument Fairness Act of 2001*, H.R. 2114, 107th Cong. (2001) (requiring that any national monument proclamation that protects more than 50,000 acres "shall cease to be effective" two years after it is issued unless it is approved by Congress); and *National Monument Fairness Act of 1997*, S. 477, 105th Cong. (1997) (requiring that all monuments in excess of 5,000 acres be approved in advance by Congress).

n553 James R. Rasband, *The Future of the Antiquities Act*, 21 J. Land Resources & Envtl. L. 619 (2001); Rasband, *supra* note 10, at 532-62; Shepherd, *supra* note 10, at 4-39 to 4-42.

n554 See, e.g., *National Monument Fairness Act of 1997*, S. 477, 105th Cong. (1997); *National Monument NEPA Compliance Act*, H.R. 1487, 106th Cong. (1999).

n555 Rasband, *supra* note 10, at 561. Rasband claims that the "overarching virtue" of wilderness values is the recognition that it is "the chase [and] not the catching [which] is paramount." Id. at 534. Rasband argues that "each wilderness venture, accomplishment is not a function of conquest but of . . . method." Id. at 535. By failing to follow a "fair or virtuous" process in designating monuments, Rasband concludes that they are "forever tarnished by the method of . . . acquisition." Id. at 561. Rasband's attempt to compare monument designation with fishing, hunting, and mountain climbing, however, ultimately fails. Fishing, hunting, and mountain climbing are private and personal endeavors where the ethical behavior of the participants ennobles the enterprise. By contrast, monument designation is in no way a private endeavor. It is a public action taken by the highest elected public official in the United States, presumably to promote the broad public interest and not any particular private interests or virtues. It is an action that readily can be overturned by the Congress. It is inconceivable to this author that many people really believe that the Grand Canyon, Zion, Olympic, or Grand Teton National Parks are "tarnished" because they were first protected by a law that did not require a public process. See *id.* at 561.

n556 Rasband, *supra* note 553, at 630 (arguing that "FLPMA's withdrawal provisions are wholly adequate to the preservation task and have the added benefit of confirming a democratic and participatory approach to withdrawal decisions").

n557 Senator Edward Robinson of Wyoming reportedly described the Jackson Hole proclamation as a "foul, sneaking Pearl Harbor blow," an astonishing statement from a United States Senator less than two years after the actual Pearl Harbor attack, at a time when the United States was in the midst of World War II. Righter, *supra* note 49, at 295. More recently, Utah Governor Michael Leavitt, in asking President Bush to designate the San Rafael

Swell National Monument following what he described as a seven year process involving "many stakeholders," used the opportunity to criticize the process followed by President Clinton to designate the Grand Staircase Escalante National Monument as a "stealth proposal." Governor Michael Leavitt, Utah State of the State Address (Jan. 28, 2002), available at <http://www.utah.gov/governor/stateofstate02.html> (last visited Feb. 27, 2003).

n558 5 U.S.C. § 553 (2000). Designation of a national monument is akin to a rulemaking proceeding since it is "an agency statement of . . . particular applicability and future effect designed to implement . . . or prescribe law or policy." *Id.* § 551(4).

n559 *Id.* § 553(b)(3)(B).

n560 A General Accounting Office study for the calendar year 1997 found that of 4,658 final regulatory actions, 2360 or 51% were published without a notice of proposed rulemaking. Of the sixty one major rules, eleven or nearly one fifth were published in final form without prior notice. United States Gen. Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules* 11, 13 (1998).

n561 Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law* § 4.4 (1993).

n562 See Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 78 (3d ed. 1998) (noting that good cause exception includes those situations in which advance notice would defeat agency's regulatory objective); Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 *Admin. L. Rev.* 113, 118 (1984) (noting that good cause exception can be invoked where notice and public procedure are impracticable, unnecessary, or against public interest). In the context of monument designation, it might be argued that affording a public process could compromise a President's ability to assure timely protection of public land resources. Moreover, while any overprotection that might result from swift action can be corrected by Congress, the failure to provide timely protection for such resources may mean that they are lost forever.

n563 See, e.g., Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Public Participation*, 26 *Envtr. L.* 53, 61 (1996) (stating that good citizens are those who participate in public affairs, thereby supporting community); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 1539, 1556 (1988) (noting that political participation is vehicle for inculcation of virtues such as empathy and feelings of community).

n564 See *infra* notes 565-604 and accompanying text.

n565 In introducing the National Monument NEPA Compliance Act, H.R. 1487, 106th Cong. (1999), to a hearing of the House Committee on Resources held on June 17, 1999, Congressman Jim Hansen of Utah noted that "the Antiquities Act . . . is being used to thwart Congressional control over the public lands, to avoid the National Environmental Policy Act, and to deny the American people the right to have input in public land decisions." *H.R. 1487 National Monument NEPA Compliance Act: Hearing on H.R. 1487 Before the Subcomm. on Nat'l Parks and Public Lands of the House Comm. on Resource*, 106th Cong. 8 (1999) (statement of Rep. Jim Hansen).

n566 See Poisner, *supra* note 563, at 53-54 (noting that citizen involvement traditionally focused on legislative branch).

n567 The phrase was coined by John Stuart Mill in his famous essay, *On Liberty*. See generally John Stuart Mill, *On Liberty*, in 43 *Great Books of the Western World* 267 (William Benton ed., 1952). The idea was carried over into the United States Constitution through the establishment of a republican system of government. The Federalist No. 10 (James Madison). In Federalist No. 10, James Madison writes: [A] pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. . . . A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. *Id.*

n568 Madison advocated passing public issues "through the medium of a chosen body of citizens, whose

wisdom may best discern the true interests of their country." *Id.*

n569 See generally Catherine Engberg, Note, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 Stan. L. Rev. 569 (2001).

n570 Arrow's Theorem, as it is now generally known, postulates that, where multiple voters confront three or more choices, there can be no assurance that the choice receiving the most votes will in fact reflect the preference of the majority of voters. See Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 Iowa L. Rev. 949, 950–51 (1990) (noting that, under Arrow's Theorem, legislative process cannot yield democratic, coherent, and stable outcomes); William T. Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 Duke L.J. 948, 950–51 (1986) (noting that collective choice cannot meet all conditions to make consistent and coherent choices).

n571 See, e.g., *Federal Land Policy and Management Act*, 43 U.S.C. § 1702(c) (2000) (defining "multiple use" to include, among other things, "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources").

n572 See, e.g., *Proclamation No. 7374*, 65 Fed. Reg. 69,227 (Nov. 9, 2000) ("The establishment of this monument is subject to valid existing rights.").

n573 For example, the original Buck Island Reef National Monument proclamation states that "neither the Department of the Interior, nor any other agency or instrumentality of the United States shall adopt or attempt to enforce any rule, regulation or requirement limiting, restricting or reducing the existing fishing, . . . bathing, or recreational privileges by inhabitants of the Virgin Islands." *Proclamation No. 3443*, 3 C.F.R. 152 (1959–1963). In a subsequent proclamation enlarging the boundaries of this monument, President Clinton prohibited all extractive uses within the boundaries of the monument. *Proclamation No. 7392*, 66 Fed. Reg. 7335 (Jan. 17, 2001).

n574 Lands under consideration for national monument status can be protected temporarily (up to three years) under FLPMA § 204(e). *Federal Land Policy and Management Act*, 43 U.S.C. § 1714(e) (2000). But such protections might prove inadequate for many controversial yet worthy proposals.

n575 As described above, the Antiquities Act currently affords no public process. 16 U.S.C. § 431 (2000).

n576 The most prominent examples are the original Grand Canyon National Monument in Arizona, and the Jackson Hole National Monument in Wyoming. *Proclamation No. 794*, 35 Stat. 2175 (1908); *Proclamation No. 2578*, 57 Stat. 731 (1943); see also *supra* notes 92–110 and 142–159 and accompanying text.

n577 Civic environmentalism is a more recent variant of this idea that is arguably more relevant to national monument decisions. See generally John DeWitt, *Civic Environmentalism, Alternatives to Regulation in States and Communities* (1994). The principles animating civic republicanism are more fully developed, and thus offer a better basis for evaluating the procedures used for designating national monuments.

n578 See Daniel Kemmis, *Community and the Politics of Place* 10–12 (1990) (noting that civic republicanism reflects Jefferson's vision of limited national government and enlightened citizenry engaged in operation of government).

n579 Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539, 1558 (1988) ("There can be little doubt that elements of both pluralist and republican thought played a role during the period of constitutional framing.").

n580 *Id.* at 1543.

n581 See *id.* at 1542–47 (noting pluralists are unwilling to take steps to promote political activity). As Sunstein explains, under the pluralist approach, which was espoused by James Madison, politicians respond in a "market

like manner" to the pressures exerted upon them by the self interested parties affected by government action. Id.

n582 Id. at 1543 44.

n583 Id. Sunstein uses race and gender discrimination as an example of an objectionable preference. Id. In the context of monument designations, private pecuniary or property interests might be deemed objectionable preferences to the extent that they distort decisions that are supposed to represent the national interest of all citizens. See id.

n584 Id. at 1547 58.

n585 Professor Rena Steinzor has written a compelling critique of "civic environmentalism." See generally Rena I. Steinzor, *The Corruption of Civic Environmentalism*, 30 Envtl. L. Rep. 10909 (2000).

n586 The controversy surrounding the Jackson Hole National Monument, Proclamation No. 2578, 57 Stat. 731 (1943), suggests that a public process might have doomed the monument. See supra notes 143 59 and accompanying text.

n587 See, e.g., National Monument NEPA Compliance Act, H.R. 1487, 106th Cong. (1999) (requiring preparation of draft and final environmental impact statement along with opportunities for public participation before monument could be proclaimed).

n588 See supra notes 21 57 and accompanying text.

n589 For example, parties may locate mining claims, as Ralph Cameron did in the Grand Canyon, see supra notes 94 99 and accompanying text, on lands being considered for monument designation.

n590 Federal Land Policy and Management Act, 43 U.S.C. § 1714(e) (2000).

n591 Proclamation No. 794, 35 Stat. 2175 (1908).

n592 Proclamation No. 869, 35 Stat. 2247 (1909).

n593 Proclamation No. 2578, 57 Stat. 731 (1943).

n594 16 U.S.C. § 4065d 1 (2000). In discussing the Jackson Hole proclamation, Senator Robertson noted that "[t]he framers of this proclamation well knew that they could never get congressional sanction to extend this park." *Abolition of the Jackson Hole National Monument: Hearing on H.R. 2241 Before the House Comm. on Pub. Lands*, 78th Cong. 99 100 (1943) (statement of Sen. Robertson). But it was for this very reason that executive branch authority was necessary to secure protection for this area. If that authority had been hampered by procedural requirements, the monument might never have been proclaimed.

n595 The Antiquities Act is silent about the process for declaring a national monument. 16 U.S.C. § 431 (2000). Thus, a decision to follow a particular process is not inconsistent with the Act.

n596 See supra notes 405 19 and accompanying text.

n597 See, e.g., Proclamation No. 7397, 66 Fed. Reg. 7,397 (Jan. 18, 2001) (authorizing continuation of low level overflights of military aircraft over monument's airspace).

n598 John Leshy, the Interior Solicitor during the Clinton Administration, describes Secretary Babbitt's comments to a congressional committee regarding the proposal to amend the Antiquities Act as suggesting that it would be "silly to change a single comma in a law that has had such a remarkable track record of success." Leshy, supra note 9, at 307 (citing Secretarial Powers Under the Federal Land Policy and Management Act of

1976: Excessive Use of Section 204 Withdrawal Authority by the Clinton Administration: Joint Oversight Hearing Before House Subcomms. on Nat'l Parks and Pub. Lands and on Energy and Mineral Res. of the House Comm. on Res., 106th Cong. 44–46 (1999) (statement of Bruce Babbitt, Secretary of the Interior).

n599 A proclamation likely will alter future management decisions on designated lands by precluding uses such as new mineral leasing, see 30 U.S.C. § 181 (2000), and it may make it unlawful to engage in activities that were previously allowed, such as off-road vehicle use. See, e.g., Proclamation No. 7374, 3 C.F.R. 199 (2001) ("For the purpose of protecting the objects identified above, the Secretary shall prohibit all motorized and mechanical vehicle use off-road."). But because monument decisions are made subject to valid existing rights, they generally do not interfere with preexisting uses. See, e.g., *id.* ("The establishment of this monument is subject to valid existing rights.").

n600 The precautionary principle is a popular approach to environmental decisionmaking in many countries, and especially among the decisionmaking authorities of the international community. See David Hunter et al., *International Law and Policy* 360–63 (1998). The Rio Declaration from the 1992 United Nations Conference on Environment and Development, also known as Agenda 21, explains and supports the precautionary principle as follows: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. *Rio Declaration on Environment and Development*, U.N. Conf. on Env't and Dev., 15 U.N. Doc. A/CONF.151/5/Rev.1, 31 I.L.M. 874, 879 (1992).

n601 U.S. Const. art. IV, § 3, cl. 2.

n602 See *infra* Appendix.

n603 See, e.g., Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101–3233 (2000). The original approximately 56 million acres of land protected by Jimmy Carter under the Antiquities Act were converted to 43.5 million acres of national parks, 53.7 million acres of wildlife refuge, 13 new wild and scenic rivers and 564 million acres of wilderness. Coggins et al., *supra* note 74, at 145. Another example of a national monument expanded and made into a national park is Mount Olympus National Monument, which was made into the Olympus National Park on June 29, 1938. 16 U.S.C. § 251 (2000).

n604 See *supra* note 159 and accompanying text.

n605 Federal Land Policy and Management Act, 43 U.S.C. § 1714(a) (2000).

n606 *Id.* § 1714(c)(1).

n607 *Id.* § 1714(c)(2). A provision authorizing FLPMA withdrawals to terminate if the Congress adopts a concurrent resolution disapproving the withdrawal, *id.* § 1714(c)(1), is most likely unconstitutional under the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919, 958–59 (1983).

n608 43 C.F.R. § 2310.3–2(b)(3) (1994). Emergency withdrawals under FLPMA § 204(e), however, need not comply with any pre-withdrawal notice and comment procedures. See 43 U.S.C. § 1714(e) (2000).

n609 Consider, for example, the controversy surrounding the Jackson Hole National Monument, Proclamation No. 2578, 3 C.F.R. 327 (1943), discussed *supra* in notes 141–59 and accompanying text.

n610 See 43 U.S.C. § 1714 (2000) (providing withdrawal authority as well as particular reasons why withdrawals might be made).

n611 The Bureau of Land Management received over 6,000 comments on its draft Grand Staircase-Escalante Management Plan. The Grand Staircase-Escalante National Monument, Chapter 5, *a v a i l a b l e a t*

<http://www.ut.blm.gov:80/monument/Monument%20Management/Initial%20Planning/feis/Chapter%205/feis%205%20A.html> (last visited Mar. 14, 2003).

n612 For example, FLPMA authorizes the Bureau of Land Management to designate "areas of critical environmental concern." 43 U.S.C. §§ 1702(a), 1712(c)(3) (2000). These areas are often withdrawn under FLPMA withdrawal procedures. *Id.* § 1714.

n613 See *supra* notes 71–265 and accompanying text.

n614 See *supra* notes 549–612 and accompanying text.

n615 See *infra* Appendix.

n616 See *supra* notes 552–54 and accompanying text.

n617 16 U.S.C. § 431 (2000).

n618 As noted previously, only ten relatively minor monuments have been abolished, and at least four of these were conveyed to state or local governments for use as public parks. See *supra* note 453 and accompanying text.

n619 See *supra* notes 452, 475 and accompanying text.

n620 Glen Canyon in southern Utah may be the most precious public land resource that was not protected, and that is now essentially lost, having been inundated by the Glen Canyon dam and Lake Powell. *Nash, supra* note 171, at 228. Oddly, it was the environmental community that agreed to sacrifice Glen Canyon in exchange for protecting a national monument—the Dinosaur National Monument—from a proposal to construct the Echo Park dam. *Id.* David Brower, who was instrumental in negotiating the deal, never visited Glen Canyon until after the deal had been struck, and lived to regret his decision. *Id.* at 229. On a visit to Glen Canyon before it was flooded he was so moved by what he saw that he commissioned a book with elaborate photographs by Elliot Porter. *Id.* Lake Powell and what remains of the Glen Canyon area is now protected as a national conservation area managed by the National Park Service. 16 U.S.C. § 460dd (2000). But to many in the conservation community, the Glen Canyon dam has come to symbolize how public treasures are sometimes lost because the efforts to protect them came too late. The American Parks Network describes the Glen Canyon Dam as "a symbol of environmental compromise." American Park Network, Glen Canyon Lake Powell: Sights to See, available at <http://www.americanparknetwork.com/parkinfo/gp/damlake.html> (last visited Feb. 27, 2003). Ation, the Glen Canyon Institute, was founded for the sole purpose of providing "leadership toward re-establishment of a freeflowing Colorado River through a restored Glen Canyon." Glen Canyon Institute, About the Glen Canyon Institute (2002), available at <http://www.glenccanyon.org/aboutgci/aboutgci.htm> (last visited Feb. 27, 2003).